Supreme Court, U.S.
FILED

96 804 NOV 20 1996

OFFICE OF THE CLERK

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NEW VALLEY CORPORATION,

Petitioner,

—v.—

NEW VALLEY CORPORATION SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS, AND WALTER E. GIRARDIN, ALEXANDER J. CHISHOLM, S.E. SMISZKO, JOHN A. HUNT, ARTHUR GARMAN, GERALD P. KENT, DELMAR HARMON, ROBERT R. GARBARINI, WALTER L. ELKINS, PHILIP SCHNEIDER, J. WILLIAM HARRINGTON, JOHN A. HOLLANSWORTH, BERNARD WEITZER, JOHN W.R. POPE, JR., ROBERT M. FLANAGAN, DOUGLAS D. LLOYD, H.E. SALTER/BARBARA ORR SALTER, RICHARD L. CALLAGHAN, AND RUSSELL W. MCFALL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SARAH S. GOLD
Counsel of Record
MYRON D. RUMELD
DEIDRE A. GROSSMAN
Proskauer Rose Goetz &
Mendelsohn LLP
1585 Broadway
New York NY 10036
(212) 969-3000

Counsel for Petitioner

132 pp

QUESTIONS PRESENTED

1. Whether, notwithstanding a provision in an employee benefit plan reserving to the plan sponsor the right to terminate or amend the plan "at any time for any reason," a court may consider a proffer of extrinsic evidence in support of a claim by retired plan participants that: (i) they contractually vested in their benefits when they retired; and/or (ii) the plan sponsor is equitably estopped from terminating such benefits?

2. Whether, in determining if a broad reservation-of-rights clause appearing in an employee benefit plan is ambiguous with respect to its application to retired participants, a court may apply unilateral contract and illusory promise principles pursuant to the federal common law of ERISA?

3. Whether, in light of ERISA's exemption of "top hat" plans from the statute's writing requirements, a court should interpret these plans using rules of contract construction that more readily permit the introduction of extrinsic evidence than those used to construe ordinary welfare plans?

4. Whether, in fashioning a rule of construction for employee benefit plans, a court may apply the state common law rules of contract construction of its own forum, as opposed to a uniform federal rule of plan construction?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is contained in the caption of the case on the cover page. New Valley Corporation, the Petitioner, is an affiliate of Brooke Group, Ltd., a publicly owned corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

TABLE OF CONTENTS TO APPENDIX x

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

The Plans 4

The Case Before The Bankruptcy Court 5

The Bankruptcy Court's Decision 6

The District Court's Affirmance 6

The Decision By The Court Of Appeals For The Third Circuit 7

New Valley's Petition For Rehearing And Suggestion For Rehearing In Banc 9

REASONS FOR GRANTING THE WRIT 10

I. THE DECISION OF THE THIRD CIRCUIT, LIKE DECISIONS IN THE SIXTH AND EIGHTH CIRCUITS, IS AT ODDS WITH THE LEGISLATIVE INTENT UNDERLYING ERISA, AS WELL AS DECISIONS IN THE SECOND, FOURTH, SEVENTH, AND ELEVENTH CIRCUITS THAT HAVE HELD THAT BROAD RESERVATION-OF-RIGHTS CLAUSES PRECLUDE CONTRACTUAL VESTING AND EQUITABLE ESTOPPEL CLAIMS WITHOUT REGARD TO EXTRINSIC EVIDENCE OR FEDERAL COMMON LAW PRINCIPLES OF CONTRACT CONSTRUCTION. . . . 12

A. THE THIRD CIRCUIT'S DECISION HIGHLIGHTS A SPLIT AMONG THE CIRCUITS ON THE AVAILABILITY OF CONTRACTUALLY VESTED RIGHTS IN THE FACE OF BROAD RESERVATION-OF-RIGHTS CLAUSES 13

B. THE CIRCUIT COURTS ARE SIMILARLY DIVIDED OVER THE USE OF UNILATERAL CONTRACT AND ILLUSORY PROMISE PRINCIPLES, PURSUANT TO THE FEDERAL COMMON LAW OF ERISA, TO "VEST" PARTICIPANTS IN RETIREMENT BENEFITS . . 17

C. THE THIRD CIRCUIT'S ADOPTION OF UNIQUE RULES FOR THE CONSTRUCTION OF TOP HAT PLANS REPRESENTS YET ANOTHER UNWARRANTED USE OF FEDERAL COMMON LAW RULE-MAKING 20

II. THE DECISION BELOW, AS WELL AS DECISIONS IN THE FIRST, SEVENTH, AND ELEVENTH CIRCUITS, ARE AT ODDS WITH DECISIONS IN THE SECOND, SIXTH, EIGHTH, AND NINTH CIRCUITS THAT HAVE APPLIED A UNIFORM RULE OF FEDERAL COMMON LAW FOR THE CONSTRUCTION OF ERISA PLANS, RATHER THAN ONE WHICH INCORPORATES THE COMMON LAW CONTRACT PRINCIPLES OF THE LOCAL FORUM. 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Ackerman v. Warnaco, 55 F.3d 117 (3d Cir. 1995) 16

Alday v. Container Corp., 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) 15, 26

Armistead v. Vernitron, 944 F.2d 1287 (6th Cir. 1991) 14, 17

Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985), *overruled in part on other grounds sub nom., Pritzker v. Merrill Lynch, et. al.*, 7 F.3d 1110 (3d Cir. 1993) 23

Bigda v. Fischbach Corp., 898 F. Supp. 1004 (S.D.N.Y. 1995), *aff'd*, 1996 U.S. App. LEXIS 4413 (2d Cir. 1996) 21

Biggers v. Wittek Indus., Inc., 4 F.3d 291 (4th Cir. 1993) 16

Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991) 24

Carr v. First Nationwide Bank, 816 F. Supp. 1476 (N.D. Cal. 1993) 14

Chiles v. Ceridian Corp.,
95 F.3d 1505 (10th Cir. 1996) 11

Curtiss-Wright v. Schoonejongen,
115 S. Ct. 1223 (1995) 16

DeGeare v. Alpha Portland Indus.,
652 F. Supp. 946 (E.D. Mo. 1986), *aff'd*,
837 F.2d 812 (8th Cir. 1988) 19

Duggan v. Hobbs, No. 95 Civ. 15863, 1996 WL
622781 (9th Cir. Oct. 29, 1996) 21

Evans v. Safeco Life Ins. Co.,
916 F.2d 1437 (9th Cir. 1990) 25

FMC v. Holliday, 498 U.S. 52 (1990) 25

Fielding v. Int'l Harvester Co.,
815 F.2d 1254 (9th Cir. 1987) 17, 19

Gable v. Sweetheart Cup Co.,
35 F.3d 851 (4th Cir. 1994), *cert. denied*,
115 S. Ct. 1442 (1995) 14, 15, 25

Grabois v. Jones,
89 F.3d 97 (2d Cir. 1996) 24

Hamilton v. Air Jamaica, Ltd.,
945 F.2d 74 (3d Cir. 1991), *cert. denied*,
503 U.S. 938 (1992) 20

Hein v. FDIC, 88 F.3d 210 (3d Cir. 1996) 22

Howe v. Varity Corp., 896 F.2d 1107
(8th Cir. 1990) 13

In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1316 (1996) . . . . . passim

Jackman v. WMAC Inv. Corp., 809 F.2d 377 (7th Cir. 1987) 20

Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1428 (1995) 13-14, 17

Kemmerer v. I.C.I. Americas, Inc., 70 F.3d 281 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1826 (1996) . . . . . passim

Lee v. Blue Cross & Blue Shield, 10 F.3d 1547 (11th Cir. 1994) 24

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 10, 11, 12

McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426 (6th Cir. 1989) 24

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 10, 12, 18

Miller v. Heller, 915 F. Supp. 651 (S.D.N.Y. 1996) 20

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988) 15, 17, 18

Morrell v. United Food and Commercial Workers Int'l Union, 37 F.3d 1302 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2251 (1995) 26

Murphy v. Keystone Steel & Wire Co.,
61 F.3d 560 (7th Cir. 1995) 14, 16, 18-19

National Co. Health Benefit Plan v. St. Joseph's Hospital, Inc., 929 F.2d 1558
(11th Cir. 1991) 18

Pane v. RCA Corp., 868 F.2d 631
(3d Cir. 1989) 23

Phillips v. Nat. Life Ins. Co.,
978 F.2d 302 (7th Cir. 1992) 26

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 26

Reichelt v. Emhart Corp., 921 F.2d 425
(2d Cir. 1990), *cert. denied*, 501 U.S.
1232 (1991) 17

Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580 (1st Cir. 1993) 26

Schoonejongen v. Curtiss-Wright, 18 F.3d
1034 (3d Cir. 1994), *rev'd and remanded on other grounds*, 115 S. Ct. 1223
(1995) 15

Shaw v. Delta Airlines, Inc.,
463 U.S. 85 (1983) 26, 27

Smart v. Gillette Company Long-Term Disability Plan, 70 F.3d 173 (1st Cir.
1995) 15

Spacek v. ILA Pension Plan,
923 F. Supp. 960 (S.D. Tex. 1996) 11

Wise v. El Paso Natural Gas Co.,
986 F.2d 929 (5th Cir. 1993), *cert. denied*,
510 U.S. 870 (1993) 18

Wulf v. Quantum Chemical Corp.,
26 F.3d 1368 (6th Cir.), *cert. denied*,
115 S. Ct. 667 (1994) 14, 17

STATUTES

Employee Retirement Income Security Act
of 1974, as amended, 29 U.S.C. § 1001, *et seq.* . . . . . passim

28 U.S.C. § 1254(1) 3

TABLE OF CONTENTS TO APPENDIX

Panel Judgment of the United States
Court of Appeals for the Third Circuit,
dated July 15, 1996 . . . . . A-1

Panel Opinion of the United States
Court of Appeals for the Third Circuit,
89 F.3d 143 (3d Cir 1996) A-3

Order of the United States District
Court for the District of New Jersey,
dated Jan. 18, 1995 . . . . . A-22

Opinion of the United States District
Court, District of New Jersey,
dated Jan. 18, 1995 . . . . . A-23

Order of the United States Bankruptcy
Court for the District of New Jersey,
dated April 20, 1994 . . . . . A-39

Transcript of Opinion of Hon. Novalyn L. Winfield, United States Bankruptcy Judge, read into the record on April 8, 1994 . . . . . A-43

Order of the Third Circuit Court of Appeals Denying the Petition for Rehearing *In Banc* dated August 22, 1996 . . . . . A-59

29 U.S.C. § 1051 . . . . . A-62

29 U.S.C. § 1081 . . . . . A-63

29 U.S.C. § 1101 . . . . . A-64

29 U.S.C. § 1144 . . . . . A-64-65

Hearing before Hon. Novalyn L. Winfield, United States Bankruptcy Judge, on March 4, 1994 . . . . . A-66

Western Union Corporation Senior Executive Benefit Plan A-86

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NEW VALLEY CORPORATION,

Petitioner,

—v.—

NEW VALLEY CORPORATION SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS, AND WALTER E. GIRARDIN, ALEXANDER J. CHISHOLM, S.E. SMISZKO, JOHN A. HUNT, ARTHUR GARMAN, GERALD P. KENT, DELMAR HARMON, ROBERT R. GARBARINI, WALTER L. ELKINS, PHILIP SCHNEIDER, J. WILLIAM HARRINGTON, JOHN A. HOLLANSWORTH, BERNARD WEITZER, JOHN W.R. POPE, JR., ROBERT M. FLANAGAN, DOUGLAS D. LLOYD, H.E. SALTER/BARBARA ORR SALTER, RICHARD L. CALLAGHAN, AND RUSSELL W. MCFALL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner New Valley Corporation ("Petitioner" or "New Valley") respectfully petitions this Court to issue a writ of certiorari to review the July 15, 1996 decision of the United States Court of Appeals for the Third Circuit and the Third Circuit's subsequent denial of New Valley's petition for rehearing and suggestion for rehearing *in banc*, issued on August 22, 1996. The Third Circuit's decision and order of July 15, 1996 reversed the decision of the United States District Court for the District of New Jersey, which had dismissed the claims for benefits brought against New Valley by a group of retired employees ("Respondents") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The court instructed the

district court to remand the case to the United States Bankruptcy Court for the District of New Jersey, where the action was instituted originally as a proof of claim, with directions to conduct an evidentiary hearing.

OPINIONS BELOW

The Third Circuit's decision of July 15, 1996 appears at pages A-1 to A-21 of the Appendix to this Petition and is reported at *In re New Valley Corp.*, 89 F.3d 143 (3d Cir. 1996). The decision denying New Valley's Petition for Rehearing and Suggestion for Rehearing *In Banc*, dated August 22, 1996, appears at pages A-59 to A-61 of the Appendix and is unpublished. The district and bankruptcy courts' decisions granting judgment in favor of New Valley and denying Respondents' request for an evidentiary hearing appear at pages A-22 to A-38 and A-39 to A-58 of the Appendix, respectively, and are both unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit issued its decision was July 15, 1996. A timely petition for rehearing was denied by the Third Circuit on August 22, 1996, and a copy of the order denying rehearing appears at pages A-59 to A-61 of the Appendix.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and, in particular: ERISA's preemption clause contained in Section 514(a), 29 U.S.C. § 1144(a); and the provisions exempting from ERISA's vesting, writing, and fiduciary requirements

> a plan which is unfunded and is maintained by an employer primarily for the purpose of providing

> deferred compensation for a select group of management or highly compensated employees.

See ERISA Sections 201(a)(1), 402(a)(1), and 401, 29 U.S.C. §§ 1051(a)(1), 1102(a)(1), and 1101. The pertinent text of these statutory provisions appears at pages A-62 to A-65 of the Appendix.

STATEMENT OF THE CASE

This case arises from a proof of claim filed by a group of retired employees of Western Union Corporation ("Western Union"), predecessor to New Valley, who challenged Western Union's right to terminate two plans (the "Plans") providing supplemental benefits to a select group of its management and highly compensated executives during a period of financial crisis. (*See* A-44) The Plans were what are commonly called "top hat" plans: unfunded plans providing benefits to a select group of management or highly compensated employees. *Id. See also* ERISA Sections 301(a)(3), 29 U.S.C. § 1081(a)(3); Section 401(a)(1), 29 U.S.C. § 1101(a)(1). Although subject to certain of ERISA's regulations, top hat plans are exempt from ERISA's vesting and fiduciary responsibility provisions. *See* 29 U.S.C. §§ 1051-61, 29 U.S.C. §§ 1101-14.

Even though the plan documents expressly reserved to Western Union the right to terminate the Plans "at any time for any reason," the Court of Appeals for the Third Circuit ruled that Respondents may introduce extrinsic evidence to support their contentions that: (i) they contractually "vested" in these benefits when they retired, and (ii) that Western Union should have been equitably estopped from terminating these benefits because of representations allegedly made to Respondents that the benefits would become permanent upon retirement. The decision represents an unwarranted use of federal common law: it creates participant rights that were purposefully omitted by ERISA and curtails the right of the plan sponsor to freely condition the award of benefits that do not vest by operation of the statute.

The Plans

In August, 1977, the Board of Directors (the "Board") of Western Union created the Senior Executive Benefit Plan ("SEBP"). (*See* A-5-6, A-52) The SEBP was designed to provide to certain of the company's executives benefits in addition to those available under Western Union's basic plan of benefits. The additional benefits included: "supplemental pension benefits" (A-57, A-89); "deferred compensation benefits" (which were in reality death benefits payable to the designated beneficiaries of retired participants (A-57-58, A-89)); "supplemental medical benefits" (which were available to participants who terminated active employment due to disability, provided that they paid the prescribed premiums (A-57, A-89)); and "supplemental disability benefits" (A-57, A-89). In 1979, a similar package of benefits was extended to Western Union executive Walter E. Girardin through a separately created plan (the "Girardin Plan"). (A-7, A-49-50)

Article 12 of the SEBP and the Board resolution creating the Girardin Plan expressly reserved to the Board the right to amend or terminate the Plans. It stated in relevant part:

> 12. AMENDMENT AND TERMINATION. The Board of Directors may amend or terminate the Plan at any time for any reason and thereafter Participants and their estates and dependents shall have only such rights under the Plan, if any, as shall be specifically provided for by the Board of Directors under the Plan as amended or terminated.

(A-54, A-96)

As Western Union's financial condition worsened in the late 1980s, it became financially impossible for the company to maintain all of its retirement benefits at their original level. As a result, Western Union implemented a series of benefit reductions, including the curtailment of funding for retiree medical benefits under the company's basic plan (*See* A-80), and the termination of the two top hat plans. (*See* A-7)

The Case Before The Bankruptcy Court

On November 15, 1991, an involuntary petition for relief, pursuant to Chapter 11, Title 11 of the United States Bankruptcy Code (the "Code"), was commenced against Western Union in the United States Bankruptcy Court for the District of New Jersey (the "bankruptcy court"). (*See* A-8) On March 31, 1993, New Valley, as Western Union's successor, consented to the entry of an order for relief under the Code. Respondents filed various proofs of claim in the bankruptcy proceeding, seeking recovery of their alleged top hat plan benefits notwithstanding the termination of the Plans. (*See* A-8, A-39-41) New Valley filed an omnibus motion seeking to have these and other claims filed against New Valley disallowed and expunged. (A-39) On January 12, 1994, Respondents filed a brief in opposition to New Valley's motion.

Although they conceded in their briefs and at oral argument that the top hat benefits in question are not statutorily vested (*see* A-80), Respondents nevertheless contended that they contractually vested in these benefits when they retired or, alternatively, that Western Union was equitably estopped from terminating them. (*See* A-74-76, A-80-81) In support of their contentions, Respondents alleged that they had not been made aware that benefits could be terminated after retirement, and that they had received assurances to this effect when the Plans were first drafted or when they were recruited to work at Western Union. (*See* A-6, A-78-79) The record established, however, that all claimants were aware of the Plans' reservation-of-rights clause by virtue of the positions they held with Western Union, their participation in the Board meeting at which the SEBP was adopted, and/or their actual receipt of the language of the SEBP or, in the case of Girardin, the Girardin Plan. (*See* A-6-7, A-44-45, A-76-77)

The Bankruptcy Court's Decision

By decision read into the record on April 8, 1994, the bankruptcy court ruled that Respondents' claims should be disallowed and expunged, based principally on the Plans' reservation-of-rights clauses. (*See* A-45-46) The court rejected Respondents' proffer of extrinsic evidence, which, according to the representations made at oral argument by Respondents' counsel, would have consisted of testimony by Respondents describing the basis for their belief that benefits could not be terminated once a participant retired from Western Union. (A-45-46, A-77-78) The court found that this evidence was inadmissible because it was "plainly at variance with the terms in the senior executive benefit plan and the Girardin Plan." (A-46)

The District Court's Affirmance

On April 29, 1994, Respondents appealed the decision of the bankruptcy court to the United States District Court for the District of New Jersey. (A-8, A-22) The basis for their appeal was their contention that the bankruptcy court had erred by refusing to afford them an evidentiary hearing in which to present extrinsic evidence. (*See* A-29-30) In support of that contention, Respondents' counsel attached to his brief an appendix entitled "Additional Facts Proffered by Respondents," containing allegations that Respondents contended were "ignored or disregarded by the bankruptcy court," but which were in fact identical to those advanced by Respondents' counsel at the oral argument before the bankruptcy court. (*See* A-32-33 (citing to Respondents' brief)) Respondents contended that: (i) the extrinsic evidence would be admissible under state common law principles (A-33); and (ii) federal common law rules that ordinarily would preclude consideration of such evidence were inapplicable to top hat plans because ERISA did not require that such plans be set forth in writing. (*See* A-33-34)

In an opinion dated January 18, 1995, the district court affirmed the bankruptcy court's decision to disallow Respondents' proofs of claim. (*See* A-22) The court ruled that the proffer of extrinsic evidence was properly rejected because, as Respondents

had already conceded, the plan language reserving to Western Union the right to terminate or amend the Plans was clear and unambiguous. (A-36-38) The district court also rejected Respondents' argument that, because top hat plans need not be set forth in writing, ERISA's rules regarding deference to the plain meaning of the plan should not apply. (A-33-34) It reasoned that:

> The fact that Congress specifically exempted top-hat plans from ERISA's vesting requirement does not mean that a departure from the plain meaning of a written top-hat plan is warranted in the instant action, particularly since Congress' exemption of top-hat plans from the writing and vesting requirements were intended to protect the employer's interests and appellants urge an interpretation which would tip the balance directly against those interests.

(*Id.*)

The Decision By The Court Of Appeals For The Third Circuit

Respondents appealed the district court's order to the Court of Appeals for the Third Circuit, based on the same contentions advanced below. On July 15, 1996, a panel of the court reversed the lower courts' dismissal of the contractual vesting and equitable estoppel claims and remanded the case with instructions to conduct an evidentiary hearing. *See In re New Valley Corp.*, 89 F.3d 143 (3d Cir. 1996) (A-1-21).

Applying "general principles of federal common law . . . of contract," the court found that the coexistence of the reservation-of-rights clause and the Plans' "several 'specific and mandatory provisions' promising what appear to be benefits which vest on retirement" (A-15), rendered the Plans internally inconsistent and thus ambiguous. In reaching this conclusion, the court rejected the method of plan construction utilized by the lower courts,

which it characterized as a misapplied "four corners" approach.[1] (A-17) Instead, it adhered to its own forum's common law principles of contract construction, pursuant to which it concluded that greater consideration should be given to extrinsic evidence. (*Id.*)

The court purported to distinguish its prior decision in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 902 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1316 (1996) ("*Unisys*"), where it found that a reservation-of-rights clause identical to the one appearing in the Plans was unambiguous, and thus precluded claims for retirement benefits based on contractual vesting and equitable estoppel theories. The court stated that *Unisys* was inapplicable to a case involving top hat plans, *inter alia*, because: (i) top hat plans are not governed by ERISA's writing requirement, which, according to the court, operates as an integration clause and forms the cornerstone of a series of decisions limiting litigants to the language of the plan document, (A-18); and (ii) top hat plan participants enjoy fewer rights and remedies under ERISA than the participants of other plans and, therefore, "[c]ontractual provisions must . . . be enforced with care." (A-20)

In its effort to distinguish *Unisys*, the court also relied on its recent decision in *Kemmerer v. I.C.I. Americas, Inc.*, 70 F.3d 281, 286-87 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1826 (1996), which applied "unilateral contract" and "illusory promise" principles as a basis for finding that a deferred compensation plan did not reserve to the employer plan sponsor the right to terminate the plan after retirement. Applying these principles here, the court stated:

---

[1] This characterization of the lower courts' methodology was peculiar since, as discussed above, Respondents' counsel was given the opportunity to describe in detail the extrinsic evidence that he was seeking to offer into evidence, both during the oral argument before the bankruptcy court and again in an appendix to the brief submitted to the district court. (*See* A-80-82)

> [l]ike the payout system set forth in *Kemmerer*, the post-retirement benefits of the New Valley plan can be construed as creating a unilateral contract offer that employees accepted by working faithfully until retirement, at which time the benefits would vest. Thus, the plan may not be terminated unless an explicit right "to terminate . . . after the participant's performance is reserved."

(A-14) (citation omitted).

The court determined that the reservation-of-rights clause did not unambiguously reserve to Western Union the right to terminate benefits once the participants had retired because such a construction would render Western Union's original promise of benefits "largely illusory." (A-15) The court recognized that "parties are free to enter into illusory agreements" (*id.*), but found the Plans to be ambiguous in light of "the unlikelihood that [parties] will do so when significant benefits are at stake . . . ." (*Id.*)

Accordingly, the Third Circuit remanded the case to the lower court with instructions to conduct an evidentiary hearing in which Respondents could offer extrinsic evidence of their subjective understanding of the scope of the reservation-of-rights clause and of the representations allegedly made to them by Western Union officials regarding their retirement benefits.

New Valley's Petition For Rehearing And Suggestion For Rehearing In Banc

New Valley petitioned the Third Circuit for rehearing, with a suggestion for rehearing *in banc*. In the petition, New Valley contended, *inter alia*, that, through its incorporation of local contract law into the federal common law of ERISA, the Third Circuit had effectively: (i) vested the top hat plan participants in rights that Congress had purposefully decided not to subject to the statutory vesting rules; and (ii) accorded top hat plan participants greater rights to retirement benefits than those available to ordinary welfare plan participants, even though

Congress clearly intended for top hat plan participants to have fewer statutory protections.

New Valley also pointed out that the case for applying unilateral contract and illusory promise principles was much less compelling here than in *Kemmerer*. Whereas in *Kemmerer* the benefits were in the form of compensation that the participants were entitled to receive during employment, but that they elected to defer until retirement, the Plans here contained a package of benefits that merely supplemented post-employment benefits already available under Western Union's basic plan of benefits. And, whereas in *Kemmerer* the plan contained no reservation-of-rights clause, here the Plans contained a very broad reservation-of-rights clause. The Third Circuit nevertheless denied the petition for rehearing on August 22, 1996 without explanation. (*See* A-59-61)

REASONS FOR GRANTING THE WRIT

This Court should grant New Valley's petition and issue a writ of certiorari to resolve conflicts among the circuit courts of appeal regarding the application of so-called "federal common law" to: (i) construe employee benefit plans governed by ERISA; and (ii) fashion relief not available under the statute.

These issues are of great importance because they have a direct bearing on ERISA's ability to uniformly regulate plan administration. As this Court has already recognized in connection with other efforts to expand ERISA's enforcement provisions, "the authority of courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (refusing to recognize common law right to recover damages via claim for participation in breach of fiduciary duty). *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (refusing to supplement ERISA's enforcement provisions with federal common law claim for extracontractual relief). While several circuits have adhered to these principles in construing plan language, others, including now the Third Circuit, have invoked federal common law rules of construction

as a means of bestowing on participants rights to benefits that Congress purposefully declined to legislate. This conflict among the circuit courts threatens to undermine ERISA's "reticulated" civil enforcement scheme, *id.* at 146, as well as the underlying statutory purpose of establishing uniform rules to govern employee benefit plan administration.

In recent years, these divergent approaches to the use of ERISA federal common law have manifested themselves in the adjudication of claims for post-retirement benefits involving plan documents that expressly reserve to a sponsor the right to terminate or amend the plan. Some courts have held that such "reservation-of-rights" clauses automatically preclude claims for benefits based on contractual vesting and equitable estoppel theories, even for participants who retired before the plan was amended or terminated. Pursuant to a "four corners" approach to contract construction, these courts will not consider extrinsic evidence if the reservation-of-rights is clear on its face. Other circuits, including now the Third Circuit, have found that even the broadest reservation-of-rights clauses are ambiguous as to whether they were intended to reserve to the employer the right to terminate benefits post-retirement, and accordingly will consider extrinsic evidence to construe them. In support of these findings, they have invoked unilateral contract and/or illusory promise principles as well as other principles of contract construction unique to their particular forum.[2]

The emerging conflict over plan construction undermines the uniformity and predictability that ERISA was designed to achieve

---

[2] Although the Third Circuit claimed that its decision is limited to top hat plans, its endorsement of unilateral contract and illusory promise principles has already been cited in construing other plans as well. *See, e.g., Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir. 1996) (citing *Kemmerer* in finding that participants could contractually vest in disability benefits); *Spacek v. ILA Pension Plan*, 923 F. Supp. 960 (S.D. Tex. 1996) (applying rules of unilateral contract articulated in *Kemmerer* in holding that pension plan could not be terminated once employee fully performed).

in connection with the administration of employee benefit plans. At the moment, the outcome of claims for benefits based on contractual vesting and equitable estoppel theories will depend largely on the particular forum adjudicating the claims. In jurisdictions like the Third Circuit, the outcome may not be determined until after the plan has had to endure costly and unpredictable trial proceedings.

The Supreme Court should therefore use this opportunity to establish uniformity in the construction of employee benefit plans and restore to plan sponsors the ability to reserve their right to place conditions and limits on unvested benefits. In the same manner in which it curtailed the use of federal common law to permit claims for extracontractual damages in *Russell* or to expand on the scope of fiduciary breach claims in *Mertens*, this Court should mandate rules of plan construction that adhere to Congress' intent to limit the availability of relief based on vesting principles.

I.

THE DECISION OF THE THIRD CIRCUIT, LIKE DECISIONS IN THE SIXTH AND EIGHTH CIRCUITS, IS AT ODDS WITH THE LEGISLATIVE INTENT UNDERLYING ERISA, AS WELL AS DECISIONS IN THE SECOND, FOURTH, SEVENTH, AND ELEVENTH CIRCUITS THAT HAVE HELD THAT BROAD RESERVATION-OF-RIGHTS CLAUSES PRECLUDE CONTRACTUAL VESTING AND EQUITABLE ESTOPPEL CLAIMS WITHOUT REGARD TO EXTRINSIC EVIDENCE OR FEDERAL COMMON LAW PRINCIPLES OF CONTRACT CONSTRUCTION

The decision below represents an exercise of unbridled judicial rule-making in the guise of the "federal common law of ERISA." By allowing the SEBP participants to proceed to an evidentiary hearing on their claim for retirement benefits, notwithstanding the presence of a broad reservation-of-rights clause, the Third Circuit extended the availability of contractual vesting and equitable estoppel claims in a manner that conflicts with the legislative intent of ERISA, as well as existing authorities in other circuits. The Supreme Court should truncate this trend in the evolution of

employee benefits law by devising a bright-line rule which, consistent with the inherent right of plan sponsors to terminate non-vested benefits, adheres to the plain meaning of reservation-of-rights clauses without regard to extrinsic evidence.

A. The Third Circuit's Decision Highlights A Split Among The Circuits On The Availability Of Contractually Vested Rights In The Face Of Broad Reservation-Of-Rights Clauses

The Third Circuit ruling represents a further erosion of the ability of plan sponsors to resist claims for contractual vesting and equitable estoppel through the use of plan provisions broadly reserving their right to terminate or amend the plan of benefits. Seizing on a footnote from its prior decision in *Unisys*, which stated that reservation-of-rights clauses need to be evaluated "based on the language of the particular plan" in question (*see* A-20) (quoting *Unisys*, 58 F.3d at 904 n.11), the court construed as ambiguous a reservation-of-rights clause that was identical to the clause it found to be unambiguous in *Unisys*. In so doing, it joined with panels in the Sixth and Eighth Circuits, which, notwithstanding the presence in the plan of a broad reservation-of-rights clause, have considered extrinsic evidence in support of contractual vesting and equitable estoppel claims brought by participants whose active employment ceased before the plan was amended or terminated.

For example, in *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1428 (1995), a panel of the Court of Appeals for the Eighth Circuit[3] considered extrinsic evidence notwithstanding the presence of a reservation-of-rights clause permitting SIPCO to "terminate, discontinue, alter, modify

---

[3] As in the Third Circuit, different panels of the Eighth Circuit are divided on the effect to be accorded a reservation-of-rights clause. *Compare Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990) (concluding as a matter of law that reservation-of-rights clause precludes claim for benefits under contractual vesting theory) *with Jensen v. SIPCO, Inc.*, 38 F.3d at 949 (discussed above).

or change this plan or any provision of this plan at any time." The court stated:

> We agree that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits. . . . But the question at this stage of the analysis is whether these provisions are so unambiguous as to make unnecessary any reference to other Plan provisions and extrinsic evidence. We think not.

38 F.3d at 950. *See also Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1378 (6th Cir.) (ruling that lower court should have considered extrinsic evidence in support of claim that participants contractually vested in right to distribution of benefits upon sale of company, notwithstanding existence of reservation-of-rights clause), *cert. denied*, 115 S. Ct. 667 (1994); *Armistead v. Vernitron*, 944 F.2d 1287, 1298 (6th Cir. 1991) (permitting introduction of extrinsic evidence in support of claim for lifetime health benefits despite plan's incorporation by reference of broad reservation-of-rights clause); *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1493 (N.D. Cal. 1993) (refusing to give effect to reservation-of-rights clause in plan document on grounds that its enforcement would negate promise of retirement benefits located elsewhere in plan).

By contrast, the Second, Fourth, Seventh, and Eleventh Circuits have adopted a bright line rule pursuant to which the presence of a broad reservation-of-rights clause constitutes conclusive evidence of a sponsor's intent not to confer contractually vested benefits, regardless of whether any other language in the plan could be construed to the contrary. *See, e.g., Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 566 (7th Cir. 1995) (ruling that reservation-of-rights clause is "plainly inconsistent with any intent [by the sponsor] to vest benefits"); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994) ("we hold that the modification clause, standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits and thus waived its statutory right to

modify or terminate the health benefit plan"), *cert. denied*, 115 S. Ct. 1442 (1995); *Alday v. Container Corp.*, 906 F.2d 660, 666 (11th Cir. 1990) (reservation-of-rights clause was conclusive as to sponsor's intent not to confer contractually vested health benefits upon retirees), *cert. denied*, 498 U.S. 1026 (1991); *see also Schoonejongen v. Curtiss-Wright*, 18 F.3d 1034, 1042 (3d Cir. 1994) ("even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as [Curtiss-Wright] maintained a health insurance program, the general reserved right to amend . . . would render the right . . . terminable by the adoption of a legally effective amendment"), *rev'd and remanded on other grounds*, 115 S. Ct. 1223 (1995).

Under this "four corners" approach to plan construction, these courts have refused to consider a proffer of extrinsic evidence as a basis for finding ambiguity in a facially unambiguous reservation-of-rights clause. *See Alday*, 906 F.2d at 665 (where plan documents "unambiguously set out the rights of the parties, including [the employer's] right to terminate or modify the plan, . . . there is no need to refer to other communications between the parties to determine the parties' intent"), *cert. denied*, 498 U.S. 1026 (1991); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (informal communications between employer and participants containing promises of "lifetime" benefits must be disregarded in presence of "express reservation of a right to amend or terminate"). *See also Smart v. Gillette Company Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995) (applying "four corners" approach to plan interpretation, and stating that "[a]s a general rule, a court should not consider extrinsic evidence to give meaning to a contract unless a contract's terms are vague or ambiguous").

By adopting this "four corners" approach to the construction of reservation-of-rights clauses, these courts are implementing Congress' intent to limit vesting to tax-qualified pension plans, and to exclude all other plans from vesting requirements. As this Court observed in discussing health plans:

> [ERISA] does not create any substantive entitlement to employer-provided health benefits. . . . Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate [these] plans. . . . Nor does ERISA establish minimum participation, vesting, or funding requirements for [these] plans as it does for pension plans.

Curtiss-Wright v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995).[4]

The limitations on vesting were plainly designed to encourage employer sponsorship of such plans. Due to the escalating and unpredictable costs associated with the benefits provided by these plans, Congress reserved to employers flexibility in limiting and conditioning the award of benefits. *See Gable*, 35 F.3d at 859 (Congress "accorded employers the flexibility to make future modifications of such plans 'as inflation, changes in medical practice and technology, and the costs of treatment dictate'") (citation omitted); *Moore*, 856 F.2d at 492 ("Automatic vesting was rejected because the costs of [welfare] plans are subject to fluctuating and unpredictable variables."). *See also Mertens*, 508 U.S. at 262 (refusing to recognize claim against non-fiduciary service-provider, reasoning that "[e]xposure to this sort of liability would [indirectly] impose high insurance costs on . . . ERISA plans" and discourage plan sponsorship). Strict enforcement of reservation-of-rights clauses ensures that this flexibility is preserved.

Conversely, by failing to construe reservation-of-rights clauses strictly, the Third, Sixth, and Eighth Circuits in *In re New*

---

[4] Relying on this passage and earlier Supreme Court decisions, several courts of appeals have concluded that the sponsor's right to terminate welfare plans is inherent. *See, e.g., Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291 (4th Cir. 1993). Conversely, other courts, including the Court of Appeals for the Third Circuit, have adopted the view that the right to terminate exists only if the sponsor reserves the right expressly in the plan document. *See, e.g., Ackerman v. Warnaco*, 55 F.3d 117 (3d Cir. 1995).

Valley, *Wulf*, *Armistead* and *Jensen* have undermined the legislative intent and compelled employer plan sponsors to endure costly and unpredictable trial proceedings to adjudicate claims for benefits under their plans. The Court should halt this dangerous trend by adopting a bright line, uniform rule that mandates adherence to the plain meaning of reservation-of-rights clauses and resolve the split among the circuits.

B. The Circuit Courts Are Similarly Divided Over The Use Of Unilateral Contract And Illusory Promise Principles, Pursuant To The Federal Common Law Of ERISA, To "Vest" Participants In Retirement Benefits

The split among the circuit courts on the construction of reservation-of-rights clauses stems from a more profound disagreement over the use of federal common law in cases governed by ERISA. In finding that the SEBP's broad reservation-of-rights clause was ambiguous, the Third Circuit applied federal common law principles endorsed in its earlier decision in *Kemmerer*, as well as by the Sixth Circuit in *Wulf*, 26 F.3d at 1378, and the Eighth Circuit in *Jensen*, 38 F.3d at 949, and expressly rejected by the Second, Seventh, and Ninth Circuits in *Moore*, 856 F.2d at 492; *Reichelt v. Emhart Corp.*, 921 F.2d 425, 432 (2d Cir. 1990), *cert. denied*, 501 U.S. 1232 (1991); *Murphy*, 61 F.3d at 564; and *Fielding v. Int'l Harvester Co.*, 815 F.2d 1254, 1257 (9th Cir. 1987). It reasoned that: (i) the SEBP "can be construed as creating a unilateral contract offer that the employees accepted by working faithfully until retirement, at which time the benefits would vest[,]"; and (ii) the "several 'specific and mandatory provisions' promising what appear to be benefits which vest on retirement," *id.* at 143, would be rendered "completely illusory" if the reservation-of-rights clause were enforced. *Id.*

The use of unilateral contract and illusory promise principles to expand the scope of contractual vesting constitutes an unwarranted exercise of federal common law rule-making. The Supreme Court already instructed, in connection with breach of

fiduciary duty claims, that the role of federal common law should be limited to filling gaps in ERISA's enforcement scheme; it should not serve as a vehicle for creating rights where Congress has already addressed the subject. *See, e.g., Mertens*, 508 U.S. at 259; *see also National Co. Health Benefit Plan v. St. Joseph's Hospital, Inc.*, 929 F.2d 1558, 1571 (11th Cir. 1991) ("a federal court could not create federal common law to apply to these issues [of plan amendment] because ERISA addresses the matter"). As the Court of Appeals for the Fifth Circuit observed:

> Legislative silence is not always the result of a lack of prescience; it may instead be token permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress . . . by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

Wise v. El Paso Natural Gas Co., 986 F.2d 929, 935 (5th Cir. 1993) (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980)), *cert. denied*, 510 U.S. 870 (1993).

The Third Circuit's decision, like the other decisions on which it purports to rely, violates these principles by utilizing federal common law, not to fill gaps in ERISA's remedial scheme, but rather to create rights to recover benefits where the legislative silence was purposeful. As discussed above, by exempting welfare and top hat plans from ERISA's vesting requirements, ERISA grants to the sponsors of these plans the right to make the promise of benefits conditional on their unilateral right to revoke these benefits at any time. By finding "illusory" a promise to provide lifetime benefits that is conditioned on the employer's reserved right to terminate the plan, the Third Circuit's decision and the cases on which it relies negate this legislative intent.

For that reason, several circuit courts have explicitly rejected the application of unilateral contract and illusory promise principles to adjudicate claims for benefits based on contractual vesting theories. *See, e.g., Murphy*, 61 F.3d at 564 (7th Cir. 1995) (rejecting argument that "exit agreements" executed by

employees upon retirement constituted unilateral contracts creating vested rights to benefits); *Fielding*, 815 F.2d at 1257 (9th Cir. 1987) (holding that lower court erred by labelling "illusory" a clause in plan document affording participants early retirement benefits "at the option of the employer"); *see also*, *DeGeare v. Alpha Portland Indus.*, 652 F. Supp. 946, 961 (E.D. Mo. 1986) (finding "harmonious and reasonable [the sponsor's] interpretation of the written documents to provide lifetime benefits subject to [the sponsor's] reserved right to amend or end the coverage"), *aff'd*, 837 F.2d 812 (8th Cir. 1988).

Although the court's departure from these decisions is purportedly limited to cases involving top hat plans, the opinion has much wider application. Unlike the deferred pension benefits in *Kemmerer*, the SEBP benefits were "deferred compensation" in name only; many of the benefits were indistinguishable from the welfare benefits at issue in the *Unisys* line of cases. Thus, whereas *Kemmerer* authorized a limited encroachment into an employer's reserved right to terminate deferred compensation benefits, this decision could enable participants in all types of welfare plans to proceed with claims for retirement benefits, even in the face of broad reservation-of-rights clauses. *See also supra* at p. 11 n.3.

Taken to its logical conclusion, the broad endorsement of unilateral contract and illusory promise principles will effectively vest participants in retirement benefits the moment they retire, thereby undermining the congressional intent to reserve to employer plan sponsors the right to terminate such benefits. The Supreme Court should use this opportunity to invalidate this resort to federal common law rule-making and issue a ruling that restores to plan sponsors their right to terminate non-vested benefits through the invocation of reservation-of-rights clauses.

C. The Third Circuit's Adoption Of Unique Rules For The Construction Of Top Hat Plans Represents Yet Another Unwarranted Use Of Federal Common Law Rule-Making

The dangers imposed by the ever-expansive use of the federal common law of ERISA are exemplified by the Third Circuit's purported creation of unique rules of construction for top hat plans. In an effort to distinguish its holding from the Third Circuit's previous decision in *Unisys*, the court ruled that top hat plans should be interpreted pursuant to more liberal rules of contract construction because these plans are not governed by ERISA's writing requirement, see 29 U.S.C. § 402,[5] and because ERISA does not afford the participants of these plans the right to bring breach of fiduciary breach claims. In so ruling, the court contravened ERISA's enforcement scheme, and thus engaged in the inappropriate use of federal common law rule-making.

ERISA's exemption of top hat plans from its writing requirements was not intended to afford highly-compensated executives additional rights based on self-serving statements about what they thought or what they were told about their benefits. To the contrary, it resulted from the realization that top hat plan participants are capable of policing plans and ascertaining their entitlement to benefits on their own.[6] The Department of Labor advises that:

---

[5] The Seventh Circuit has already rejected the argument that more liberal rules of construction should apply to plans not governed by ERISA's writing requirement. *See Jackman v. WMAC Inv. Corp.*, 809 F.2d 377, 382 (7th Cir. 1987).

[6] Where applicable, ERISA's writing and disclosure requirements ordinarily serve "two salutary purposes . . . [:] to ensure that 'the individual participant knows exactly where he stands with respect to the plan' and 'to enable employees to police their plans.'" *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 78 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992) (citation omitted).

> [I]n providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of [ERISA Parts 2, 3, and 4].

90 Op. DOL 14A, 3-4 (1990), cited in *Duggan v. Hobbs*, No. 95 Civ. 15863, 1996 WL 622781 (9th Cir. Oct. 29, 1996); and *Miller v. Heller*, 915 F. Supp. 651 (S.D.N.Y. 1996). *See also Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1015 (S.D.N.Y. 1995) ("Top hat plans, which are a type of employee benefit plan for high-ranking employees, are exempted from all substantive provisions on the assumption that these employees have enough power to negotiate adequate plans for themselves and need only the information and enforcement protections of ERISA."), *aff'd*, 1996 U.S. App. LEXIS 4413 (2d Cir. 1996).[7]

The panel decision undermines this legislative scheme by

---

[7] Unlike excess benefit plans, which are excluded from ERISA entirely, *see* 29 U.S.C. §§ 1002(36), 1003(b)(5), and thus governed by state law, top hat plans remain within the embrace of Title I of ERISA, which includes the statute's civil enforcement provisions, 29 U.S.C. § 1132, and its preemption provision, 29 U.S.C. § 1144. Therefore, whatever protections are available to top hat plan participants are those delineated in the statute. *See Pane v. RCA Corp.*, 868 F.2d 631, 637 (3d Cir. 1989) (affirming district court's finding that ERISA preempts contractual and other claims for post-employment benefits under top hat plan); *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 930 (3d Cir. 1985) ("It is evident from the legislative history that Congress did not choose to grant such plans a blanket exemption from ERISA, as it could have done, but instead keyed the exemption to specific substantive provisions of the legislation."), *overruled in part on other grounds sub nom. Pritzker v. Merrill Lynch, et al.*, 7 F.3d 1110 (3d Cir. 1993).

relying on the unavailability of the writing requirement as a justification for altering the rules of construction for top hat plans. The opinion states in pertinent part:

> Top hat plans are exempt from §1102(a)(1). As a result, top hat agreements can be partially or exclusively oral. They may, of course, be integrated by their own terms, just as they may contain any provision to which the parties agree. They do not, however, gain the benefit of statutory additions such as §1102(a)(1). Consequently, *Hozier* and other cases which limit employees strictly to the terms of the plan document are inapposite. Top hat plans are instead governed by general principles of federal common law. . . . Here, that law is the federal common law of contract.

(A-12). The court then proceeds to apply a rule of construction pursuant to which language found to be unambiguous in connection with retiree health benefits is deemed ambiguous here. (A-15)

The panel similarly uses this rationale to increase the availability of relief via an equitable estoppel claim. With respect to welfare plan participants, the Third Circuit already recognized that no estoppel claim may be asserted where the plan plainly and unambiguously reserved to the employer sponsor the right to terminate benefits. *See Unisys*, 58 F.3d at 908 ("a participant's reliance on employer representations regarding benefits may never be 'reasonable' where the participant is in possession of a written document notifying him of the conditional nature of such benefits"); *see also Hein v. FDIC*, 88 F.3d 210 (3d Cir. 1996) (applying *Unisys* in dismissing equitable estoppel claim where plan document contained clause notifying participants of conditional nature of benefits). Here, however, the panel concludes:

> Because top hat plans can be partially or exclusively oral, top hat participants may reasonably rely on oral

> representations of benefits, even in the face of a termination clause like Article 12.

(A-11)

The court also seizes on the inapplicability of breach of fiduciary duty claims as an additional ground for providing more expansive relief to top hat plan participants via common law claims:

> Top hat employees have rights only under the contract. Welfare benefit plan participants, by contrast, enjoy an action for breach of fiduciary duty. . . . Top hat plans have no such alternative remedy. They must seek their remedy in contract law. Contractual provisions must therefore be enforced with care.

(A-19)

In short, the Third Circuit mistakenly assumed that, in light of the inapplicability of certain statutory protections to top hat plans, it could legislate a more expansive avenue of relief via contractual vesting and equitable estoppel claims. In so doing, it undermined ERISA's carefully designed civil enforcement scheme.

II.

THE DECISION BELOW, AS WELL AS DECISIONS IN THE FIRST, SEVENTH, AND ELEVENTH CIRCUITS, ARE AT ODDS WITH DECISIONS IN THE SECOND, SIXTH, EIGHTH AND NINTH CIRCUITS THAT HAVE APPLIED A UNIFORM RULE OF FEDERAL COMMON LAW FOR THE CONSTRUCTION OF ERISA PLANS, RATHER THAN ONE WHICH INCORPORATES THE COMMON LAW CONTRACT PRINCIPLES OF THE LOCAL FORUM

The Third Circuit's error in invoking federal common law as a means for expanding participant rights to retiree benefits was compounded by its reliance on local common law principles of contract construction as the relevant reference point for fashioning a federal common law rule of plan interpretation.

Relying on these principles, it rejected as an improper "four corners" approach the lower courts' methodology of plan construction, and instead adopted an approach pursuant to which it more readily found the Plans' language ambiguous, notwithstanding the presence of the broad reservation-of-rights clause. It thereby reached a result that differed from the result that likely would be obtained in other jurisdictions.

By adhering to the forum's law of contract construction, the court exposed yet another conflict among the circuits. Like the Third Circuit, the First, Seventh, and Eleventh Circuits have resorted to the rules of contract construction applicable in their own jurisdictions in fashioning federal common law rules to construe ERISA plans. By contrast, the Second, Sixth, Eighth and Ninth Circuits have adopted rules of construction based on ERISA's unique regulatory framework and underlying goals. *Compare Phillips v. Nat. Life Ins. Co.*, 978 F.2d 302, 311-12 (7th Cir. 1992) (adopting state law rule of contract interpretation, *contra proferentem*, in deciding claim for benefits) *and Lee v. Blue Cross & Blue Shield*, 10 F.3d 1547, 1551 (11th Cir. 1994) (same) *with Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990) (rejecting adoption of state law rule of *contra proferentem* to determine meaning of "mental illness" in ERISA health plan because it contradicts principle that parties' intent is focus of inquiry in construing ERISA plans), *cert. denied*, 501 U.S. 1238 (1991) *and McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 429-30 (6th Cir. 1989) (declining to interpret ERISA plan according to rule of *contra proferentem*, reasoning that reliance on state rules in fashioning federal common law frustrates ERISA's goal of creating a uniform body of rules for nationwide plans); *see also Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 585 (1st Cir. 1993) (applying Puerto Rico contract law to determine meaning of term "vested" in voluntary separation plan release); *but see Grabois v. Jones*, 89 F.3d 97 (2d Cir. 1996) (explaining that term "beneficiary" contained in ERISA pension plan must be interpreted according to ERISA federal common law rules of contract construction rather than New York rules governing

survivorship rights); *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439-40 (9th Cir. 1990) (refusing to rely on state court decisions that found term "children" ambiguous in fashioning ERISA federal common law rule of plan interpretation).

This Court has already recognized the merits of fashioning the federal common law of ERISA with a view toward national uniformity. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court recognized that, "[t]he uniformity of decision which [ERISA] is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." 481 U.S. at 56 (citations omitted). And in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), it cautioned that, although a court may rely on state law principles as a basis for fashioning ERISA federal common law, it may do so only where such laws are consistent with the policies underlying the statute and their use will not result in "conflicting or inconsistent state and local regulation of employee benefit plans." *Id.* at 99.[8]

Applying these principles here, the Supreme Court should reject the lower courts' reliance on state law principles of contract construction, and should use this opportunity to adopt a uniform federal rule in its place. Consistent with the legislative intent discussed above, such a rule of construction should

---

[8] These principles have also guided the Court's application of ERISA's preemption clause. For example, in *FMC v. Holliday*, 498 U.S. 52 (1990), the Court found preempted a Pennsylvania statute that prohibited insurers and employee benefit plans from exercising subrogation rights against their insureds, finding that "[a]pplication of differing state subrogation laws to plans would . . . frustrate plan administrators' continuing obligation to calculate uniform benefits nationwide." *Id.* at 60. The Court observed that "[w]here a patchwork scheme of regulations would introduce considerable inefficiencies in benefit program operations, we have applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations." *Id.* Accordingly, in lieu of the Pennsylvania law, the Court applied the subrogation rule set forth in the plan document.

preserve the right of plan sponsors to terminate benefits through the use of reservation-of-rights clauses.

Several circuit courts have already adopted rules that, if uniformly applied, would fulfill the statutory purpose. Some courts have applied a "four corners" approach that strictly adheres to the plain meaning of the plan language. *See, e.g.*, *Gable*, 35 F.3d at 856; *Alday*, 906 F.2d at 665. Others have adopted a modified "four corners" approach which, like the approach taken by the lower courts in this case, allows for consideration of the parties' extrinsic evidence, but rejects the proffer outright where it is being offered to alter, rather than interpret, the terms of the plan. *See, e.g.*, *Morrell v. United Food and Commercial Workers Int'l Union*, 37 F.3d 1302, 1303 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2251 (1995). The Court's adoption of either of these rules would restore uniformity among the states in the administration of employee benefit plans, while preserving the integrity of ERISA's civil enforcement scheme.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

SARAH S. GOLD
Counsel of Record
MYRON D. RUMELD
DEIDRE A. GROSSMAN
Proskauer Rose Goetz
& Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioner

New York, New York
November 20, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5140

IN RE: NEW VALLEY CORPORATION,
Debtor

SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS;
RICHARD L. CALLAGHAN; ALEXANDER J. CHISHOLM;
W. LEE ELKINS; ROBERT M. FLANAGAN;
ROBERT F. GARBARINI; ARTHUR A. GARMAN;
WALTER GIRARDIN; DELMAR HARMON;
J. WILLIAM HARRINGTON; JOHN P. HUNT;
JOHN A. HOLLANSWORTH; GERALD P. KENT;
D.D. LLOYD; RUSSELL W. MC FALL;
JOHN W.R. POPE, JR.; HERBET SALTER,
Estate of; STEVE SMISZKO; PHILLIP SCHNEIDER;
BERNARD WEITZER

v.

NEW VALLEY CORPORATION

SENIOR EXECUTIVE BENEFIT PLAN
PARTICIPANTS AND WALTER E. GIRARDIN,
ALEXANDER J. CHISHOLM, S.E. SMISZKO, JOHN
A. HUNT, ARTHUR GARMAN, GERALD P. KENT,
DELMAR HARMON, ROBERT R. GARBARINI,
WALTER L. ELKINS, WALTER E. GIRARDIN,
PHILIP SCHNEIDER, J. WILLIAM HARRINGTON,
JOHN A. HOLLANSWORTH, BERNARD WEITZER,
JOHN W.R. POPE, JR., ROBERT M. FLANAGAN,
DOUGLAS D. LLOYD, H.E. SALTER/BARBARA
ORR SALTER, RICHARD L. CALLAGHAN, AND
RUSSELL W. MCFALL,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 94-cv-02405)

Present: Becker, Roth, and Lewis, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on December 11, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered January 23, 1995, be, and the same is hereby vacated and the cause is remanded to the District Court with direction to vacate the order of the Bankruptcy Court and to further remand to the Bankruptcy Court to hear appellants' proffered evidence on the meaning of Article 12. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk

Clerk

Dated: July 15, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5140

IN RE: NEW VALLEY CORPORATION,
Debtor

SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS;
RICHARD L. CALLAGHAN; ALEXANDER J. CHISHOLM;
W. LEE ELKINS; ROBERT M. FLANAGAN;
ROBERT F. GARBARINI; ARTHUR A. GARMAN;
WALTER GIRARDIN; DELMAR HARMON;
J. WILLIAM HARRINGTON; JOHN P. HUNT;
JOHN A. HOLLANSWORTH; GERALD P. KENT;
D.D. LLOYD; RUSSELL W. MC FALL;
JOHN W.R. POPE, JR.; HERBET SALTER,
Estate of; STEVE SMISZKO; PHILLIP SCHNEIDER;
BERNARD WEITZER

v.

NEW VALLEY CORPORATION

SENIOR EXECUTIVE BENEFIT PLAN
PARTICIPANTS AND WALTER E. GIRARDIN,
ALEXANDER J. CHISHOLM, S.E. SMISZKO, JOHN
A. HUNT, ARTHUR GARMAN, GERALD P. KENT,
DELMAR HARMON, ROBERT R. GARBARINI,
WALTER L. ELKINS, WALTER E. GIRARDIN,
PHILIP SCHNEIDER, J. WILLIAM HARRINGTON,
JOHN A. HOLLANSWORTH, BERNARD WEITZER,
JOHN W.R. POPE, JR., ROBERT M. FLANAGAN,
DOUGLAS D. LLOYD, H.E. SALTER/BARBARA
ORR SALTER, RICHARD L. CALLAGHAN, AND
RUSSELL W. MCFALL,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 94-cv-02405)

Present: Becker, Roth, and Lewis, Circuit Judges

Reversed and remanded with direction.

George J. Cotz (argued), Donald W. Reeder, Ramsey, New Jersey, for Appellants.

Myron D. Rumeld (argued), Deidre A. Grossman, Proskauer, Rose, Goetz & Mendelsohn LLP, New York City, Frank Vecchione, Crummy, Del Deo, Dolan, Griffinger & Vecchione Professional Corporation, Newark, New Jersey, for Appellee.

Before: BECKER, ROTH and LEWIS, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

Appellants, participants in two top hat pension plans, filed claims in bankruptcy court seeking benefits after their employer had been declared bankrupt and terminated the plans. The bankruptcy court dismissed their claims, relying on a clause in the plan documents that reserved the company's right to amend or terminate the plans "at any time for any reason." The bankruptcy court found this language clear and unambiguous, and it refused appellants' proffer of extrinsic evidence to show that the clauses did not represent the original understanding of the parties. The district court affirmed. We will reverse and remand.

We conclude that the record in this case, viewed in the light of the special nature of top hat plans, distinguishes this case from prior decisions in which we have held a clause reserving the right to

terminate or amend unambiguous and controlling. *See In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896 (3d Cir.1995); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir.1990). Therefore, we hold on the facts of this case that the bankruptcy court should have permitted the appellants to present extrinsic evidence in support of their allegations. We will remand to the district court with instructions to remand to the bankruptcy court to conduct the necessary evidentiary hearing.

I.

Appellants are former executives and highly paid personnel of Western Union Corporation ("Western Union") who participated in two top hat plans designed to provide deferred retirement income and other retirement benefits to a select group of employees. As discussed more fully below, top hat plans represent a special category of benefit plans created under ERISA to provide these types of benefits to select employees. After the employees had retired, Western Union's successor, New Valley Corporation ("New Valley"), terminated the plans. Appellants responded with this action for benefits. The facts are essentially undisputed.

In the mid-1970s, the first rumblings of technological revolution were felt in the communications industry. Western Union had suffered financial reverses in the early part of the decade, and its Board of Directors ("Board") perceived a need to attract new executives to the company and to retain the key executives that it had. The Board viewed an enhanced benefits and compensation package as the principal means to that end.

In early 1977, the Board began discussing a supplemental benefits package entitled the Senior Executive Benefit Plan ("SEBP" or "SEB Plan"). The SEB Plan would provide a select group of high-level employees with supplemental pension benefits, deferred compensation benefits, and supplemental medical benefits. The plan was designed to achieve the previously identified goal of retaining Western Union's top management personnel and luring talented candidates to the company.

The initial draft of the plan was prepared by Gerald Kent, then Vice President-Employee Relations, in a form that substantially resembled the "SEBP Plan Summary" later distributed to the

executives selected to participate. This document described the plan benefits in some detail but made no mention of any reservation of the company's unilateral right to amend or terminate the plan. Based on this summary, the Board approved the plan on August 23, 1977. The Board's minutes similarly omitted any mention of a right to amend.

After the Board's action, Western Union distributed copies of the Plan Summary to potential participants. As noted, the Plan Summary contained nothing indicating that Western Union reserved the right to amend or terminate the plan. Western Union also held meetings with the participants to discuss the plan. Appellants allege that at these meetings they were informed that they would earn the promised benefits by continuing their employment with Western Union until retirement and that the benefits could not be taken away after retirement. Throughout the initial stages of plan proposal, development, adoption, negotiation, and acceptance, no reservation of the right to amend or terminate existed.

Western Union's General Counsel, Richard C. Hostetler, drafted the formal plan. The formal plan document, introduced five months later at a board meeting on February 28, 1978, included an article which reserved the right to amend or terminate the plan at any time. The text of this article, Article 12, reads: 12. Amendment and Termination. The Board of Directors may amend or terminate the Plan at any time for any reason and thereafter Participants and their estates and dependents shall have only such rights under the Plan, if any, as shall be specifically provided for by the Board of Directors under the Plan as amended or terminated. All subsequent versions of the plan contained this provision. However, none of the versions of the plan contained an integration clause.

Appellants are prepared to offer Mr. Hostetler's testimony that Article 12 was included in the SEBP formal document as "boiler plate" language that had been contained in all of Western Union's employee benefit plan documents. Mr. Hostetler would also testify that at the Board meeting where Article 12 was discussed, the general understanding was that the provision could not be used to change or terminate benefits after retirement. Appellants further allege that during a series of meetings held to discuss particular

provisions in the Plan which might be of concern, Mr. Kent told them Article 12 could not be used to change or terminate their benefits after retirement. Appellants likewise contend that this understanding was conveyed to executives recruited by the company. Accordingly, although the plans as adopted contained the termination "at any time" language, the appellant's understanding of that provision was informed by these representations.

In 1979, a separate plan was created for Walter E. Girardin ("Girardin Plan"). The motivation for the Girardin Plan was much the same as for the SEBP, to retain a key executive. At the time, Western Union faced a potentially difficult transition from its long-standing Chairman and CEO, Russell McFall, to his successor, Robert M. Flanagan. Girardin, who had worked for Western Union for more than 40 years, had been passed over for the CEO position. When Girardin announced his decision to retire, the Board decided that he should be kept on for at least a year so that his skill and experience could help in the transition. Western Union offered Girardin an enhanced benefits package to induce him to remain with the company. After some negotiating, Girardin accepted. Although the Girardin Plan was adopted separately and at a date later than the SEB Plan, its substantive provisions were identical. It ultimately met the same fate as the SEBP. Both plans will be discussed together.

After appellants had retired, New Valley terminated the plans, relying on Article 12 for its authority. Appellants believe that, under the original agreement underlying the plan documents, such action was impermissible. Appellants therefore contend that New Valley breached the SEBP and Girardin contracts. Alternatively, appellants urge that New Valley be estopped from terminating their benefits because of the promises Western Union made to the plan participants. Appellants allege a variety of damages from the breach of contract, framed alternatively as detrimental reliance on Western Union's promise. Their claims include leaving secure employment with other companies to join Western Union, declining employment offers from other companies to remain at Western Union, uprooting families and moving to New Jersey to become eligible for the SEBP, taking early retirement based on plan

benefits, and declining to pursue other retirement options because of the plan.

The procedural history of this case began in the bankruptcy court. At the time New Valley terminated the plans, its creditors had placed it in Chapter 11 bankruptcy. Appellants therefore responded to the denial of benefits by filing proofs of claims in the bankruptcy proceeding, rather than by following the traditional course of a suit in district court for benefits under 29 U.S.C. § 1132(a). In pursuing their claims, appellants argued that Article 12 had to be considered in the context in which it was created and that, when taken in that context, it was ambiguous. They asked for a hearing in which they could support their claims with extrinsic evidence, including the testimony of Mr. Hostetler.

The bankruptcy court disallowed appellants' claims, relying principally on Article 12 of the plans. The bankruptcy court described appellants' proposed construction of Article 12 as plainly at variance with the terms in the plans. *In re New Valley Corp.*, Ch. 11 Case No. 91-27704, Oral Decision with respect to Omnibus Objection No. 5 at 7 (Bankr. D.N.J. Apr. 8, 1994) (hereinafter "Bankruptcy Court Opinion"). The court held that the plans had been validly terminated pursuant to Article 12. *Id.*

The district court affirmed the bankruptcy court's decision, holding that the exemption of top hat plans from ERISA's writing requirement would not permit a departure from the plain meaning of Article 12, that Article 12 could not reasonably be interpreted to mean the plans vested at retirement, and that the bankruptcy court properly refused to hold an evidentiary hearing on the intent of the parties. *Senior Executive Benefit Plan Participants v. New Valley Corp. (In re New Valley Corp.)*, Adv. No. 94-2405, slip op. at 19-20 (D.N.J. January 18, 1995) (hereinafter "District Court Opinion"). This appeal followed.

II.

The bankruptcy court heard this action pursuant to 28 U.S.C. § 157. The district court had subject matter jurisdiction over the initial appeal under 28 U.S.C. § 158(a). This court has jurisdiction over the appeal from the district court pursuant to 28 U.S.C. § 158(d). We exercise plenary review over the district court's determinations and over the bankruptcy court's conclusions of law. We review the bankruptcy court's findings of fact for clear error. *Fellheimer, Eichen & Braverman v. Charter Technologies, Inc.*, 57 F.3d 1215, 1223 (3d Cir.1995).

III.

The principal issue before us is not whether the appellants can recover as a matter of law, but rather whether they can present evidence to establish that they bargained for a contractual set of benefits instead of a pension terminable at New Valley's whim any time after their retirement. We hold that appellants should have the opportunity to clarify the meaning of their benefits contract through a proffer of extrinsic evidence. Their claims will then succeed or fail based on the evidence presented to the fact finder.

A.

As a threshold matter, we have little difficulty concluding that ERISA provides the framework for our analysis. ERISA's coverage extends broadly to include all employee benefit plans. *See Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 929 (3d Cir.1985).[1] The SEB and Girardin Plans are clearly ERISA plans. See 29 U.S.C. § 1002(3) (defining "employee benefit plan"); *Miller v. Eichleay Engineers, Inc.*, 886 F.2d 30, 33 n. 7 (3d Cir.1989).

Finding ERISA applicable, however, is only an initial step. The far more important determination is to locate the SEB and Girardin Plans within ERISA's landscape. Both plans at issue are

---

[1] *Barrowclough*'s holding on the arbitrability of statutory ERISA claims was overruled in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir.1993). *Barrowclough* remains good law for the points cited in this opinion.

top hat plans, a fact that has crucial implications for this case. "A top hat plan is a 'plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly trained employees.' 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1)." Miller, 886 F.2d at 34 n. 8; see also 29 U.S.C. §§ 1002(36), 1003(b). The elements of this definition make the top hat category a narrow one. Not only must the plan be unfunded and exhibit the required purpose, it must also cover a "select group" of employees. This final limitation has both quantitative and qualitative restrictions. In number, the plan must cover relatively few employees. In character, the plan must cover only high level employees. Because of these limitations, top hat plans form a rare sub-species of ERISA plans, and Congress created a special regime to cover them.

The dominant characteristic of the special top hat regime is the near-complete exemption of top hat plans from ERISA's substantive requirements. Section 1051(2) exempts top hat plans from ERISA's minimum participation standards, minimum vesting standards, and various other content requirements. Section 1081(a)(3) exempts top hat plans from ERISA's minimum funding requirements. Section 1101(a)(1) exempts top hat plans from ERISA's fiduciary responsibility provisions, including the requirement of a written plan, the need to give control of plan funds to a trustee, the imposition of liability on fiduciaries, and limitations on transactions and investments.[2] Section 1051(2) exempts top hat plans from ERISA's reporting and disclosure requirements upon promulgation of the proper administrative regulations. These regulations are in place. 29 C.F.R. s 2520.104-23 (1995) (establishing minimal alternative reporting requirements for top hat plans); *Pane v. RCA Corp.*, 868 F.2d 631, 637 (3d Cir.1989); *see generally Barrowclough*, 752 F.2d at 930-31. As a result, top hat plans are

---

[2] Employee welfare benefit plans are exempted by parallel provisions from the first two categories discussed here. 28 U.S.C. §§ 1051(1), 1081(a)(1). Employee welfare benefit plans are not exempted from ERISA's fiduciary responsibility provisions, particularly the requirement of a written plan. See discussion, infra.

covered only by ERISA's enforcement provisions. *Kemmerer v. ICI Americas, Inc.*, 70 F.3d 281, 286-87 (3d Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 1826, 134 L.Ed.2d 931 (1996); Barrowclough, 752 F.2d at 931, 935, 937.

Although all of these provisions are important in defining the top hat category, one specific exemption from this list has particular importance for the current dispute: top hat plans are excluded from ERISA's writing requirement. Other ERISA plans, by contrast, are governed by a stringent writing requirement: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). This provision has formed the cornerstone of a series of decisions by this and other courts limiting litigants to the language of the plan document. *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir.1990) (citing cases). Under this interpretation, § 1102(a)(1) essentially operates as a strong integration clause, statutorily inserted in every plan document covered by the fiduciary duty provisions. Like any common law integration clause, § 1102(a)(1) makes the plan document the entire agreement of the parties and bars the introduction of parol evidence to vary or contradict the written terms. *See Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1010 n. 9 (3d Cir.1980) (discussing integration clauses and parol evidence rule).

Top hat plans are exempt from § 1102(a)(1). As a result, top hat agreements can be partially or exclusively oral. They may, of course, be integrated by their own terms, just as they may contain any provision to which the parties agree. They do not, however, gain the benefit of statutory additions such as § 1102(a)(1). Consequently, Hozier and other cases which limit employees strictly to the terms of the plan document are inapposite. Top hat plans are instead governed by general principles of federal common law. Barrowclough, 752 F.2d at 936. Here, that law is the federal common law of contract.

Both parties agree that the plans in question are top hat plans. Both the SEB Plan and the Girardin Plan therefore exist in the unique top hat category of ERISA coverage and exemption. They are exempt from the writing requirement of § 1102(a)(1), and

federal common law developed under the aegis of ERISA governs their enforcement.

Applying the federal common law of contract, we believe that the bankruptcy court erred in construing the plan documents. A court cannot interpret words in a vacuum, but rather must carefully consider the parties' context and the other provisions in the plan. Moreover, extrinsic evidence should have been considered to determine whether an ambiguity existed, especially in the absence of an integration clause in the plan.

Whether a document is ambiguous presents a question of law properly resolved by this court. *Stendardo v. Federal Nat'l Mortgage Ass'n*, 991 F.2d 1089, 1094 (3d Cir.1993).[3] Our precedents clearly establish the steps involved in resolving a contractual ambiguity.

To decide whether a contract is ambiguous, we do not simply determine whether, from our point of view, the language is clear. Rather, we "hear the proffer of the parties and determine if there [are] objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings." *Sheet Metal Workers [v. 2300 Group, Inc.]*, 949 F.2d [1274] at 1284 [3d Cir.1991] (brackets in original) (quoting *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980)). Before making a finding concerning the existence or absence of ambiguity, we consider the contract language, the

---

[3] In rejecting appellants' claim, the district court relied heavily on its belief that "Appellants concede that the termination clause ... is unambiguous." *See* District Court Opinion at 14. We do not understand appellants to have ever conceded this point, nor would such a concession be logically consistent with their proffer of extrinsic evidence to clarify an ambiguity. Instead, we find that appellants have all along contended that while the language of Article 12 might appear unambiguous in some abstract context, it was in fact ambiguous in the context of the plan document. This is how they stated their position to the bankruptcy court and again on appeal. Moreover, this is exactly the type of argument that our analytic approach to ambiguity is intended to address. *See* discussion, *infra*. We therefore do not regard the ambiguity question as conceded or waived.

meanings suggested by counsel, and the extrinsic evidence offered in support of each interpretation. *Id.*; *[International Union v.] Mack Trucks*, 917 F.2d [107] at 111 [3d Cir.1990]; see also Restatement (Second) of Contracts § 223 cmt. b (1981) ("There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown...."). Extrinsic evidence may include the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning. *Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir.1993). And once a contract provision is found to be ambiguous, extrinsic evidence must be considered to clarify its meaning. *See Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir.1994); *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227, 1234 (3d Cir.1991).

Neither the bankruptcy court nor the district court followed these steps. Both instead adopted, and then misapplied, a "four corners" approach to the contract. *Mellon Bank*, 619 F.2d at 1011 ("Under a 'four corners' approach a judge sits in chambers and determines from his point of view whether the written words before him are ambiguous."). Since *Mellon Bank*, however, this court has required the judge to hear the proffer of the parties and consider extrinsic evidence to determine whether there is an ambiguity, and then to resolve or clarify any ambiguity that may exist.

B.

Our interpretation of the SEB and Girardin top hat plans is assisted by our recent decision in *Kemmerer v. ICI Americas, Inc.*, 70 F.3d 281, 286-87 (3d Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 1826, 134 L.Ed.2d 931 (1996). The unilateral contract theory in Kemmerer supports appellants' explication of the plans as a whole and of Article 12 in particular.

In *Kemmerer*, we interpreted a top hat plan that permitted plan participants to elect a payment schedule by which they would receive their benefits. The plaintiffs elected an extended payment schedule and later retired. The company then unilaterally terminated the plan, paying the remaining amounts due the participants in three annual installments. 70 F.3d at 285. The

participants sued, the district court found a breach, and we affirmed.

After concluding that top hat plans were subject to ERISA, we turned to contract principles to resolve the dispute. *Id.* at 287. Examining the contract as a whole, we found a unilateral contract which created vested rights in those employees who accepted the offer it contained by continuing in the company's employment until retirement. *Id.* "Under unilateral contract principles, once the employee performs, the offer becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain." *Id.* In response to ICI's argument that the contract did not restrict its right to terminate the plan, we observed, even when a plan reserves to the sponsor an explicit right to terminate the plan, acceptance by performance closes that door under unilateral contract principles (unless an explicit right to terminate or amend after the participants performance is reserved). "Any other interpretation ... would make the Plan's several specific and mandatory provisions ineffective, rendering the promises embodied therein completely illusory." *Id.* at 287-88 (emphasis added) (quoting *Carr v. First Nationwide Bank*, 816 F.Supp. 1476 (N.D.Cal.1993)). In our view, the company's claim to an unfettered right to terminate in the face of specific grants of benefits "ha[d] no basis in contract law" and was "more than minimally unfair." *Id.* at 287.

Like the payout system set forth in *Kemmerer*, the post-retirement benefits of the New Valley plan can be construed as creating a unilateral contract offer that the employees accepted by working faithfully until retirement, at which time the benefits would vest. Thus, the plan may not be terminated unless an explicit right "to terminate ... after the participant's performance is reserved." *Kemmerer*, 70 F.3d at 287-88.

In the current case, the plan documents do contain language that could be interpreted as reserving a right for New Valley to terminate even after retirement: the plan says it can be terminated "at any time." As a matter of plain language, New Valley contends, this phrase is unambiguous. But this is not necessarily so. A common example shows that the meaning of "at any time" depends on the context. Suppose an employer and employee enter

into a contract stating that employee will work forty hours per week for $500, payable at the end of the week. The contract further states that employment is at will and employer can change employee's wages "at any time." After working a week, employee goes to pick up her pay check. Employer informs employee that it has exercised its right to change her wages "at any time," and will be paying her $300 for that week's work. Despite the seemingly unambiguous "at any time" language, it seems reasonable that an employee would not expect the reduction in salary to take place post-performance. Although this is not our situation, it makes clear that the words "at any time" may admit of more than one reasonable interpretation.

The appropriate question, then, is whether "at any time" is unambiguous in this context. The benefits at issue in this case, like the wages in our hypothetical case, are payable entirely after performance. As in the wage scenario, agreeing to allow New Valley to terminate the benefits even after retirement would make this "contract" largely illusory. Although parties are free to enter into illusory agreements, the unlikelihood that they will do so when significant benefits are at stake may render a term ambiguous. In this context, the unlikelihood that the Appellants agreed to allow New Valley to terminate their retirement benefits at its whim, coupled with Appellants' reasonable alternative interpretation of "at any time" (until performance), supports the argument that the term is ambiguous. If New Valley desired to clearly indicate its ability to terminate benefits even after performance, in the face of likely expectations to the contrary, it could have simply added the words "including after retirement" to the plan.

Moreover, in the current case, as in *Kemmerer*, other provisions in the plan point to a binding contractual agreement. For example, the plan documents contain several "specific and mandatory provisions" promising what appear to be benefits which vest on retirement. These provisions include Article 4, Deferred Compensation Benefit; Article 5, Supplemental Disability Benefit; and Article 6, Supplemental Medical Benefits. The language quoted here is taken from the original 1977 plan.

Article 4 states: "A deferred compensation benefit will be paid upon the death of any Participant after retirement on pension...."

Article 5 states: "Any Participant entitled to receive [basic benefits] whose Total Service at the date of disability exceeds five years, will receive ... a supplemental disability benefit...." Article 6 states: "(a) Following termination of active employment on account of disability, a Participant may obtain supplemental medical benefits .... (b) In the event of death ..., the dependents of that Participant may obtain medical benefits .... (c) Dental benefits will be provided at no cost to [qualified participants]." App. at 33- 34 (emphasis added). The mandatory language of these provisions denotes benefits that will be provided by the company once the participant retires, i.e., benefits that vest at retirement.

Other provisions provide less definite support for vested benefits. Article 3 states the requirements for a participant to receive a supplemental benefit. These requirements include participation in the Basic Contributory Plan during employment, followed by retirement and receipt of a pension under the Basic plan. Article 3 also states the method for calculating the supplemental pension. This provision implies that a pension calculated in this manner will be given to those participants who satisfy these requirements.

Article 10, Suspension of Benefits, also provides indirect support for vesting at retirement. This article makes no mention of post-retirement actions that could result in termination of benefits. It discusses only "engag[ing] in any activity or conduct which, in the judgment of the Committee, is prejudicial to the best interests of the Corporation or its subsidiaries." *Id.* at 34. While this omission is not conclusive, it is consistent with a pension that vests on retirement.

"An ambiguous contract is one capable of being understood in more senses than one.... Before it can be said that no ambiguity exists, it must be concluded that the questioned words or language are capable of [only] one interpretation." *American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574, 581 (3d Cir.1995) (quoting *Landtect Corp. v. State Mut. Life Assur. Co.*, 605 F.2d 75, 80 (3d Cir.1979)). Based on the two interpretations offered by the parties, we cannot say that here. By numerous indicia--(1) that the words "at any time" are inconclusive; (2) that the right to terminate even after retirement would render the

provisions for benefits largely illusory; and (3) that the plan contains numerous specific and mandatory provisions--the contract language appears ambiguous. These factors, coupled with the oral representations made by New Valley to the plaintiffs (that the plan did not permit termination after retirement) and the fact that we are dealing with an unintegrated top hat plan, convinces us that an ambiguity exists as to whether there was a right to terminate after retirement (or only before). Our opinion is thus a narrow one, informed by this concatenation of factors. Construing the plan document "as a whole," *see Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93 (3d Cir.1992), we find appellants understanding of Article 12 at least equally plausible as New Valley's interpretation.

Because appellants have demonstrated ambiguity in the plan, the bankruptcy court should have permitted appellants to present extrinsic evidence to clarify its meaning. *See Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir.1994); *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227, 1234 (3d Cir.1991). Evidence of the parties' intent, such as that proffered by appellants, is directly relevant to this issue. *Smith v. Hartford Ins. Group*, 6 F.3d 131, 139 (3d Cir.1993) ("[t]o choose between these competing meanings, we can consider extrinsic evidence of the parties' understanding of that term"); *see also Taylor*, 933 F.2d at 1233 (noting "the reasonable understanding of the beneficiaries, as well as the intent of the employer, may be admissible to clarify ambiguities [in an ERISA plan term]").

C.

The bankruptcy court should also consider appellants' promissory estoppel claims in light of their proffered extrinsic evidence. We have recognized the viability of estoppel claims against ERISA plans in general, see Rosen v. Hotel & Restaurant Employees and Bartenders Union, 637 F.2d 592, 598 (3d Cir.), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1981), and against top hat plans in particular, *Pane v. RCA Corp.*, 868 F.2d at 638.

To establish a claim for equitable estoppel under ERISA, a plaintiff must prove: (1) a material representation, (2) reasonable

and detrimental reliance upon the representation, and (3) extraordinary circumstances. *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir.1994). In the context of this case, the first two elements are particularly germane. Because top hat plans can be partially or exclusively oral, top hat participants may reasonably rely on oral representations of benefits, even in the face of a termination clause like Article 12.

On remand, the bankruptcy court should address these issues. Analysis of appellants' estoppel claims will necessarily be affected by the interpretation given Article 12.

D.

In reaching these conclusions, we are well aware of our decision in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896 (3d Cir.1995), which reached a different conclusion about the validity of a similar termination clause in the context of a different type of ERISA plan. We do not believe that Unisys can control the uniquely narrow category of top hat benefit plans on these different facts.

First, unlike the welfare benefits at issue in Unisys, top hat plans are exempt from ERISA's writing requirement, 29 U.S.C. § 1102(a)(1). The rationale behind this distinction seems straight-forward. The potentially expansive size and scope of welfare benefit plans makes a writing requirement necessary as a practical matter of plan administration. Our decision in Unisys, for example, addressed a large scale employee welfare plan that provided a variety of benefits to approximately 21,000 employees at all levels. 58 F.3d at 899 n. 4. Top hat plans, by contrast, cover narrow groups of select individuals. Because of the limited number of employees involved and their place in the organizational hierarchy, top hat plans can be exempted from the writing requirement without inviting administrative difficulties.

In terms of distinguishing *Unisys*, the exemption of top hat plans has importance beyond this practical rationale. As noted, supra, the writing requirement has formed the basis of a series of cases limiting employee- litigants to the language of plan documents. *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir.1990) (citing cases). The provision buttressed our

decision in Unisys, where we noted that ERISA's framework ensures that employee benefit plans be governed by written documents and summary plan descriptions, which are the statutorily established means of informing participants and beneficiaries of the terms of their plan and its benefits. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, [908 F.2d 1155, 1160 (3d Cir.1990)], *Confer v. Custom Engineering Co.*, 952 F.2d 41 (3d Cir.1991); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74 (3d Cir.1991), *cert. denied*, 503 U.S. 938, 112 S.Ct. 1479, 117 L.Ed.2d 622 (1992); 29 U.S.C. § 1022(a)(1). Accordingly, any retiree's right to lifetime medical benefits under a plan can only be found if it is established by the terms of the plan documents. 58 F.3d at 902. We later explained that under this provision, "the written terms of the plan documents control and cannot be modified or superseded by the employer's oral undertakings." *Id.* In the context of top hat plans, however, *Unisys's* statements are simply not true. The writing requirement does not apply. *Unisys* is not controlling.

Second, the exemption of top hat plans from ERISA's fiduciary provisions creates an important difference from *Unisys* in terms of the remedy available. Top hat employees have rights only under the contract. Where a contract action fails, they have no recourse. Welfare benefit plan participants, by contrast, enjoy an action for breach of fiduciary duty. We held in *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir.1995), *cert. denied*, — U.S. —, 116 S.Ct. 1316, 134 L.Ed.2d 469, 470 (1996), that welfare plan participants retained a cause of action for breach of fiduciary duty, despite the same general right to terminate or amend held fatal to the participants' contractual claim in the related *Unisys* case discussed here, 58 F.3d 896. Top hat participants have no such alternative remedy. They must seek their remedy in contract law. Contractual provisions must therefore be enforced with care.

Third, the very different nature of the benefits at issue in *Unisys* distinguishes that case from this. In *Unisys*, employees participated in an unfunded welfare benefit plan that promised ongoing medical benefits "for life." The benefits were payable as compensation while the employees worked and then continued on into retirement. After the participants retired, the company terminated the plan,

relying on a general reservation of the right to modify or terminate "at any time" and "for any reason." The district court held the reservation of the right to terminate clear and unambiguous. It therefore rejected the participants' breach of contract and equitable estoppel claims and entered summary judgment for the employer. *Id.* at 898. We affirmed.

Although the language of the termination clause in *Unisys* was similar to the clause here, syntax is not determinative. This case involves benefits that are not payable, at all, until after retirement. In contrast to the benefits in *Unisys*, which were ongoing medical benefits available during working years and continuing into retirement, the benefits here became available only upon retirement. As we have noted, agreeing to terms allowing these benefits to be terminated even after retirement would make the "agreement" illusory. Thus, because interpreting the words "at any time" to include "after retirement" seems less reasonable in this context, the words are more likely to be ambiguous in this case.

These distinctions (and the others noted above) show the important differences between the plans examined here and those examined in *Unisys*. In addition, we note that our decision in *Unisys* recognized its own limitations. We do not hold that a reservation of rights will always prevail over a promise of benefits. Due to the abundance of ERISA plan and the differing benefits these plans provide, each case must be considered fact specific and the court must make its determination of the benefits provided based on the language of the particular plan it has been called upon to review. *Id.* at 904 n. 11. We merely add to this general caution a caveat about the type of plan that the court must review. Here, in the context of a top hat plan, *Unisys's* holding does not apply.

IV.

For the foregoing reasons, we will vacate the order of the district court and remand the matter with direction to vacate the order of the bankruptcy court and further remand to the bankruptcy court to hear appellants proffered evidence on the meaning of Article 12. We intimate no belief as to the ultimate meaning of Article 12, nor the eventual success of appellant's claims.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS, et al.,	:	
	:	Civil Action
Appellants,	:	No. 94-2405(JWB)
	:	On Appeal From An Order
v.	:	Of The United States
	:	Bankruptcy Court
NEW VALLEY CORPORATION,	:	
	:	Below: Case No.
Debtor/Appellee.	:	91-27704(NLW)

ORDER

For the reasons set forth in the Court's opinion filed herewith,

It is on this 18th day of January, 1995,

ORDERED that the United States Bankruptcy Court's determination of April 20, 1994 is hereby reversed to the extent that it found that New Valley Corporation (formerly Western Union Corporation) was not obligated to pay Mr. Girardin's benefits under the Girardin Plan during the period from December 31, 1991 through February 29, 1992. In all other respects the determination is hereby affirmed; and it is further

ORDERED that this matter be and it hereby is remanded to the United States Bankruptcy Court for the District of New Jersey for proceedings consistent with this Opinion.

JOHN W. BISSELL

United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS, et al.,	
Appellants,	Civil Action No. 94-2405(JWB) On Appeal From An Order Of The United States Bankruptcy Court
v.	
NEW VALLEY CORPORATION,	
Debtor/Appellee.	Below: Case No. 91-27704(NLW)

APPEARANCES:
DONALD W. REEDER, ESQUIRE
10 S. Franklin Turnpike, Suite 203
P.O. Box 630
Ramsey, New Jersey 07446

- and -

RODERICK A. METTE, ESQUIRE
9109 Whitehall Road
Ellicott City, Maryland 21042
(Co-Attorneys for Certain SEBP Participants
and Walter E. Girardin)

PROSKAUER ROSE GOETZ & MENDELSOHN
By: Myron D. Rumeld, Esquire
1585 Broadway
New York, New York 10036

AKIN, GUMP, STRAUSS, HAUER & FELD
65 East 55th Street, 33rd Floor
New York, New York 10022

- and -

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
By: Patricia A. Szakats, Esquire
One Riverfront Plaza
Newark, New Jersey 07102-5497
(Co-Counsel for New Valley Corporation)

BISSELL, District Judge

This appeal was filed by plaintiffs, Certain Senior Executive Benefit Plan ("SEBP") Participants and Walter E. Girardin ("Girardin"), a participant in the "Girardin Plan," seeking review of a final order entered by the bankruptcy court by Judge Novalyn L. Winfield on April 20, 1994 (the "Order"). That order terminated all claims' plaintiffs had filed in the proceedings against the New Valley Corporation (formerly "Western Union Corporation") pursuant to Chapter 11 of the United States Bankruptcy Code. Plaintiffs sought damages for alleged breach by defendant New Valley Corporation of supplemental enhanced benefit plans that the Corporation offered to certain high-level senior employees in an effort to encourage job candidates to join the Corporation and to encourage current senior employees to postpone their retirement.

This Court has jurisdiction pursuant to 28 U.S.C. § 158. Currently before this Court is plaintiffs' appeal from the bankruptcy court's April 20, 1994 Order.

FACTS

On November 15, 1991, a group of creditors filed an involuntary petition for bankruptcy against New Valley Corporation, formerly known as Western Union Corporation, pursuant to Chapter 11 of the United States Bankruptcy Code. *In re: New Valley Corporation*, Docket No, 92-4884, slip op. June 4, 1993 at 3. Serious financial difficulties encountered during several years preceding the filing of the petition had forced New Valley to

reduce its work force from 14,000 employees in 1984 to 2,200 employees in 1993. (*Id.*) Prior to encountering financial difficulties, New Valley offered to certain of its high-level employees "top-hat" benefit plans to supplement their regular retirement benefit plans. (Appellee's Br. at 3). "Top-hat plans," as defined by the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. § 1001 *et seq.*, are unfunded plans which provide benefits to a select group of management or highly-compensated employees. (*Id.*, citing 29 U.S.C. §§ 1021(2), 1081(a)(3), and 1101(a)(1) (1985)).

The SEBP was established on or about August 23, 1977 by a resolution of the Western Union Corporation's ("Western Union") Board of Directors in order to provide "supplemental pension benefits," a "deferred compensation benefit" which consisted of a lump-sum payment payable upon death of a participant to the participant's beneficiary, supplemental disability benefits and supplemental medical benefits, (Appellants' Br. at 4 (citing Boyle Aff. of Feb. 9, 1994, Exh. A., ¶ 4)). Appellants are retired executives of Western Union or its principal operating subsidiary, Western Union Telegraph Company and were designated participants in the SEBP. The SEBP, set forth in a formal plan document, was ratified by the Board of Directors at a meeting on February 28, 1978. (Appellants' Br. at 4). It was distributed to the majority of the participants on or about May 3, 1978.

Within the language of the SEBP was a formal "Amendment and Termination" clause, which stated

> 12. AMENDMENT AND TERMINATION. The Board of Directors may amend or terminate the Plan at any time for any reason and thereafter Participants and their estates and dependents shall have only such rights under the Plan, if any, as shall be specifically provided by the Board of Directors under the Plan as amended or terminated.

(Appellants' Br. at 4 (citing Boyle Aff., Exhs. IIB, IIG).

At around the same time, Western Union developed a special plan, known as the "Girardin Plan," in order to provide supplemental pension benefits to employee Walter E. Girardin in consideration for Mr. Girardin's agreement to postpone his

retirement from service as President of the Western Union Telegraph Company until no earlier than June 1, 1980, (Appellants' Br. at 4-5 (citing Boyle Aff., Exh. F)). The Board resolution adopting the Girardin Plan stated, *inter alia*:

> ... the Board of Directors may amend or terminate this supplemental benefit at any time for any reason and thereafter Walter E. Girardin and his estate and dependents shall have only such rights as shall be specifically provided for by the Board of Directors pursuant to such amendment or termination.

(*Id.*)

New Valley concedes that it terminated the two top-hat plans ("the Plans"), the SEBP and the Girardin Plan, when Western Union was suffering from serious financial difficulties. (Appellee's Br. at 3). According to appellants, Western Union reduced and eventually terminated the benefits provided under the Plans after the appellants had retired from employment with the company. Appellants state also that Western Union reduced without notice the supplemental medical benefits provided for in the SEBP and has not yet shown that the reduction was approved by a resolution of the Board of Directors. Finally, appellants state that Western Union advised the participants that, effective March 1, 1991, the deferred compensation death benefits would be terminated. Western Union discounted SEBP payments entirely as of December 31, 1991. (Appellants' Br. at 5 (citing Boyle Aff., Exh. J)).

Appellants state that Western Union also ceased payments of benefits due under the Girardin Plan as of December 31, 1991, despite the fact that the resolution of the Board of Directors' Executive Committee purporting to terminate the Girardin Plan stated that the termination date for the Plan was February 29, 1992. (Appellants' Br. at 5-6 (citing "Walter E. Girardin Proof of Claim," Creditor # 311, Attachment, at 5)).

Appellants assert that the Plans were adopted in order to recruit key executives to and to retain them at Western Union. (Appellants' Br. at 6). Furthermore, appellants state that they received repeated assurances from Western Union's agent that the benefits could not be taken away after appellants had retired, and that appellants relied on these assurances to their detriment. (*Id.*) According to

appellants, the plan summary which was provided to appellants on August 29, 1977 does not contain any reference to debtor's reservation of the right to amend or terminate the SEBP. (*Id.* at 7-8). Nor do the minutes of the Board meetings at which the SEBP was discussed and then adopted make any reference to the reservation of the right to amend or terminate the Plan. (*Id.* at 7). Appellants state that they were notified of their selection to participate in the SEBP by letter dated August 29, 1977 and were, at that time, given a copy of the Summary Plan Description. *Id.* at 7-8). At meetings debtor's agents held with appellants, appellants state that they were assured that they would earn the promised benefits if they continued their employment with Western Union until they retired, and that the benefits could not be taken away. (*Id.* at 8 (citing Tr. of March 4, 1994 Hearing at 23, 26)).

Appellants assert that the reservation of the right to amend or terminate did not appear either in writing or in oral statements until the date the formal plan document was presented to the Board of Directors on February 28, 1978. (Boyle Aff., Exh. H at 139).

The debtor's General Counsel, Mr. Richard C. Hostetler, directed the drafting of the Plan and, according to appellants, discussed the reservation of rights clause with the Board at the February 28th meeting, stating that Article 12, the reservation of rights provision, contained the same boilerplate language as did all Western Union employee benefit plans. Appellants argue that Mr. Hostetler left the Board with the impression that, although the clause afforded Western Union broad discretion in determining whether to amend or terminate the Plan, it would not be invoked to cause Plan benefits to be forfeited by a participant after that participant's retirement. (*Id.* at 8-9 (citing Hostetler Aff. of Dec. 27, 1993, ¶ 8)).

Furthermore, appellants state, other Western Union personnel charged with the duty to explain the SEBP to participants or to recruit new executives consistently responded to inquiries regarding Article 12 by stating that the benefits offered under the SEBP would be earned by participants who joined Western Union and remained there until retirement, and that the benefits could not be taken from a participant after he or she retired. (Appellants' Br. at 9-10). Statements to this effect came, according to appellants, from members of Western Union such as the chairman of the Board of Directors, the chief executive officer, general counsel and the

corporate secretary, who were responsible for drafting and interpreting the SEBP document, and the vice-president of employee relations, who was responsible for implementing the Plan and to whom participants had been referred to discuss their concerns about any of the provisions contained in the Plan. (*Id.* at 11).

In developing the Girardin Plan, Western Union was attempting to provide Mr. Girardin with supplemental pension benefits which would induce Mr. Girardin to postpone his retirement for at least one year, to June 1, 1980. In exchange for postponing his retirement, Mr. Girardin was to receive a supplemental pension equal to the difference between sixty percent of his base pay and the pension payable to him under the regular plan. (*Id.* at 12-13).

Appellants argue that both Mr. Girardin and Western Union understood that the benefits under the Plan would vest upon Mr. Girardin's retirement, at or after June 1, 1980. (*Id.* at 13). Nevertheless, the Board of Directors assigned the Employee Relations Department the task of drafting the agreement, and that Department, which was aware of the understanding regarding when the Plan would vest, drafted a plan containing a reservation of rights clause identical to Article 12 in the SEBP. (*Id.* at 14).

Several years after Mr. Girardin retired, Western Union, which was by then known as New Valley, sent him a letter, dated December 1991, stating that his supplemental pension would be terminated effective December 31, 1991 pursuant to the Board of Directors' resolution terminating the SEBP. Mr. Girardin states that he sent a letter advising that his supplemental pension plan was separate from the SEBP, and received in return two letters, dated February 4 and February 26, respectively advising that Mr. Girardin's pension plan had also been terminated, but refusing to provide a requested copy of the Board resolution purporting to terminate the Girardin Plan. (*Id.* at 14-15). Mr. Girardin's benefit payments under the Plan ceased on December 31, 1991. The requested copy of the Board resolution subsequently provided to the bankruptcy court in support of New Valley's objection to Mr. Girardin's claim indicates that Mr. Girardin's supplemental pension was terminated effective February 29, 1992. (*Id.* at 15).

ANALYSIS

A. Standard Governing District Court Review of Bankruptcy Court Rulings

A district court exercises *de novo* review over a bankruptcy court's conclusions of law and reviews a bankruptcy court's findings of fact under a clearly erroneous standard of review. *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992); Fed. R. Bankr. P. 8013. Evidentiary decisions of the bankruptcy court are reviewed for abuse of discretion. *Hill v. Equitable Trust Co.*, 851 F.2d 691, 699 (3d Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989). The "abuse of discretion" standard requires reversal of a bankruptcy court's decision if "no reasonable [person] would take the view adopted by the trial court." *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir, 1976).

B. The Instant Action

1. The Decision of the Bankruptcy Court

Appellants each filed a timely proof of claim with the bankruptcy court. On March 4, 1994, Judge Novalyn L. Winfield of the United States Bankruptcy Court for the District of New Jersey held oral argument to consider, *inter alia*, appellee's objection to appellants' SEBP claims and to Mr. Girardin's claim. Judge Winfield found, in an Opinion entered on April 20, 1994, that the Plans were "top-hat plans" which were not subject to ERISA's vesting rules, so that appellee could properly have reserved the right to terminate these plans. Neither party disputed this finding. (Bankr. Op. at 4, 7). Citing the affidavit of William Boyle and the documents attached thereto, the Bankruptcy Court found that the Plans contained provisions for amendment or termination of the Plans. (Bankr. Op. at 5-6). Judge Winfield rejected appellants' argument that the appellants did not have notice of the termination clause, finding that the clause was clearly stated in the Plans themselves, and that Plan summaries and other documents provided to appellants did not purport to be the Plans themselves. (*Id.* at 6). The Bankruptcy Court also rejected appellants' argument that, although the Plans have a concededly unambiguous termination clause, the parties to the agreements establishing the Plans understood that the clause would not be

invoked. Judge Winfield found that no evidence submitted by appellants amply supported that argument, (*Id.* at 6-7).

Next, Judge Winfield turned to the question of whether New Valley terminated the Plans using proper procedures. She noted that, on December 26, 1991, the Board of Directors made a resolution by consent, in lieu of a formal meeting, to terminate the SEBP effective December 31, 1991. On February 29, 1992, the Executive Committee of the Board of Directors resolved, by unanimous consent and in lieu of a meeting, to terminate the Girardin Plan. Citing New York Business Corporation Law Section 708 (McKinney 1986), the Bankruptcy Court noted that a board may act by resolution adopted by unanimous consent instead of holding a formal meeting, and that therefore the termination of the SEBP by appellee's Board had been effective. The Court also cited Section 712, which authorizes action to be taken by an executive committee in lieu of a formal meeting by the board of directors, and found that Western Union's Executive Committee of the Board of Directors had effectively terminated the Girardin Plan. (*Id.* at 9-10).

2. Appellee's Right to Terminate the Plans

Appellants argue that the Bankruptcy Court improperly rejected their factual allegation that, at the time the Plans were developed, both Western Union and the participants believed that Western Union would not be permitted to terminate the benefits promised to any participant after retirement. (Appellants' Br. at 18). The Bankruptcy Court found that the statements to that effect were "unattributed to any specific senior executive benefit plan member or Mr. Girardin" and are "unattributed to any specific certification, affidavit or anything that would lend any evidentiary value to that statement." (Bankr. Op. at 6). Appellants contend that the Bankruptcy Court refused appellants' proffer of additional evidence and did not take into consideration an affidavit of Richard C. Hostetler which had been submitted to the Bankruptcy Court for review. (Appellants' Br. at 18).

This Court finds that the Bankruptcy Court properly refused to consider extrinsic evidence in interpreting the appellee's right to terminate the SEBP and the Girardin Plans. In *Pane v. CA Corp.*, 868 F.2d 631 (3d Cir. 1989), cited by Judge Winfield in support of

her ruling in the instant action, the United States Court of Appeals for the Third Circuit noted that

> [s]ection 514(a) of ERISA provides that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1982). The term "relate to" has been construed broadly. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 102 S. Ct. 2890, 2899-2900, 77 L.Ed. 2d 490 (1983).

(Additional citations omitted). In the instant action, the parties agree that the SEBP Plan and the Girardin Plan are "tophat plans." Such plans are governed by, *inter alia*, Section 401(a)(1) of ERISA, 29 U.S.C. § 1101(a)(1). Section 401(a)(1) defines a top-hat plan as

> a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

Top-hat plans, while generally governed by ERISA, are exempt from certain requirements generally applicable to ERISA plans. For instance, top-hat plans "are not subject to the funding, participation, vesting or fiduciary standards applicable to other employee benefit plans." *See Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989); *see also Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245, 250 (6th Cir. 1989). Because top-hat plans are not subject to ERISA's vesting requirements, they may be terminated by an employer. Top-hat plans are also exempt from ERISA's requirement that benefit plans "be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1).

Appellants seek to have this Court apply federal common law in interpreting appellee's right to terminate the SEBP and the Girardin Plans. While appellants concede that the termination clauses in the Plans are unambiguous, they maintain that, in accordance with general principles of contract law, this Court should consider extrinsic evidence related to the alleged intent of

the parties to make the Plans vest at retirement and not be subject to amendment or termination thereafter. (Appellants' Br. at 29). Essentially, appellants assert that, although ERISA does not require that a top-hat plan vest, the parties may by agreement arrange to have a top-hat plan which does vest, and that the parties here did so by verbal agreement. (*Id.* at 27 (citing *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990); *Ryan v. Chromalloy American Corp.*, 977 F.2d 598 (7th Cir. 1989)). Appellants argue that federal common law regarding the interpretation of contracts, which allows a court to consider extrinsic evidence when construing a contract, should govern the question of whether the top-hat plans at issue vested upon retirement of the participants. (Appellants' Br. at 29-30).

This Court finds that appellants' argument on this issue must be rejected and the Bankruptcy Court's ruling affirmed. Top-hat plans, which are supplemental benefit plans offered to select, highly-compensated employees, are understandably subject to fewer ERISA protections than are more basic essential medical and welfare plans. It is a

> fundamental and well-established proposition that is an integral part of the [ERISA] scheme [that] "[n]on-vested benefits may be reduced or eliminated at any time.... Congress deliberately chose to provide this flexibility where non-vested benefits are concerned in order to minimize the costs of benefit plan administration and to encourage employers to create these plans."

Deibler v. United Food & Commercial Workers' Local Union 23, 973 F.2d 206, 211 (3d Cir. 1992).

Appellants concede that the termination clause contained in each of the Plans is unambiguous, but nevertheless argue that this Court should look to extrinsic evidence to interpret the clauses, arguing that such evidence will show that the parties did not intend to allow termination or modification of the Plans after the participants retired. (Appellants' Br. at 29-33). Neither party has presented to this Court, nor has the Court's own research uncovered, a case which has decided whether plans not subject to ERISA's writing requirement may be amended orally or should be interpreted using extrinsic evidence. However, appellants' argument that the Court

should consider extrinsic evidence of alleged statements by Western Union must nevertheless be rejected for several reasons.

First, while top-hat plans are exempt from some ERISA requirements, they are nevertheless still governed by ERISA, and general principles underlying ERISA are relevant here. "ERISA was enacted 'to promote the interests of employees and beneficiaries in employee benefit plans,' and 'to protect contractually defined benefits.'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 109, 114 (1989) (citations omitted). The desire to create certainty regarding the terms of plans, a desire which pervades the ERISA statute, has led courts to reject oral and informal modifications of plans which the statute requires to be in writing, even where those modifications would increase benefits received by eligible employees. 29 U.S.C. § 1102(b)(3). *See, e.g., Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (rejecting an alleged modification contained in an informal writing); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990) (rule that modifications must be in form of formal writing applies equally to cases where modification would increase benefits or decrease benefits).

The fact that Congress specifically exempted top-hat plans from ERISA's writing requirement does not mean that a departure from the plain meaning of a written top-hat plan is warranted in the instant action, particularly since Congress' exemption of top-hat plans from the writing and vesting requirements were intended to protect the employer's interests and appellants urge an interpretation which would tip the balance directly against those interests. In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), the Court of Appeals for the Third Circuit noted in its discussion of welfare plans, which, like top-hat plans, are exempt from ERISA's vesting requirements, that

> Congress plainly did not impose as stringent vesting requirements as it might have. We can hardly attribute that decision to oversight, however. Having made a fundamental decision not to require employers to provide any benefit plans, Congress was forced to balance its desire to regulate extant plans more extensively against the danger that increased regulation would deter employers from creating such plans in the first place. In other words, although

> ERISA was clearly "designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 103 S. Ct. 2890 2896 (1983), the statute was also designed to "minimize[]" the "adverse impact" of "cost increases" imposed on employers by the tougher regulation, H. Rep. No. 533, 93rd Cong., 1st Sess. 1, reprinted in 1974 U.S. Code Cong. & Admin. News 4639. Thus, Congress analyzed "all of the provisions in (ERISA] ... on the basis of their projected costs in relation to the anticipated benefit to the employee participant." *Id.*, 1974 U.S. Code Cong. & Admin. News 4639-40.
>
> Moreover, Congress imposed *no* vesting requirements on welfare plans because it determined that "[t]o require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H. Rep. No. 807, 93rd Cong., 2d Sess. 60, reprinted in 1974 U.S. Code Cong. & Admin. News 4670, 4726; S. Rep. No. 383, 93rd Cong., 1st Sess. 51, reprinted in 1974 U.S. Code Cong. & Admin. News 4890, 4935.

Hozier, 908 F.2d at 1160 (emphasis in original).

Because Congress' decision to exempt welfare and top-hat plans from ERISA's writing requirement was, unlike most other portions of ERISA, clearly intended to benefit the employer, it would upset the balance Congress sought to achieve to construe the writing and vesting exemptions for top-hat plans in a way so as to prevent an employer who had expressly reserved the right to amend or terminate that plan from exercising that right. In fact, that right is reserved for the employer by statute even in the absence of an express reservation of the right in the written plan, or in the absence of any written plan at all.

This Court does not agree with appellants that the question of whether a clear, express reservation of the right to terminate or amend a top-hat plan that is reduced to writing should be interpreted in conjunction with extrinsic evidence falls into an area which ERISA does not address and must therefore be decided according to principles of federal common law. As discussed earlier in this Opinion, this Court finds that the provisions of

ERISA which do apply to top-hat plans and the legislative intent behind the statute provide sufficient guidance to preclude, in this Court's view, a conclusion that ERISA leaves the matter entirely unaddressed. Whereas it may be the case that a federal common law claim for equitable estoppel may be available where a plan does not expressly reserve the right to change or amend its terms, *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986), or in "extraordinary circumstances" where a plaintiff relies on more than mere verbal assurances, *Rosen v. Hotel & Restaurant Employees and Bartenders Union*, 637 F.2d 592 598 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981), the Court finds no need to look to federal common law where a written contract expressly contains a concededly unambiguous reservation of rights clause.

Furthermore, the Court notes that employing principles of federal common law would lead to the same result as the Court has already reached. Appellants concede that

> Debtor has argued, and the Bankruptcy Court appears to have held, that the language in question, "at any time," is not ambiguous and clearly allows the Company to amend or terminate the plans at any time both before or after the participants' retirement. Although we agree that this language is not ambiguous on its face we submit that in the context of the purposes and bargained for nature of these plans and the clear intent of the parties, more explicit language should be required to sustain a construction permitting the unfettered discretion of the Debtor to terminate the promised benefits to participants after they had fully earned them by their services to the Company after retirement.

(Appellants' Br. at 33). Nevertheless, appellants submit that "Article 12 and the comparable Girardin language should be interpreted, in accordance with the purpose of those plans and the intent of the parties, as terminable at any time *before the participant's retirement*." (*Id.*) (Emphasis in original). However, the cases appellants cite in support of their request all deal with situations where the language of the written agreement itself is susceptible to varying interpretations. For instance, in *Mayer v. Development Corp. of America*, 541 F. Supp. 828, 857 (D.N.J. 1981), which appellants cite in support of their contention that the

rule in this district and in the Third Circuit is that a court should look to extrinsic evidence to determine the intent of the parties even where the language of the contract at issue is unambiguous, the court was in fact dealing with potentially conflicting provisions within an agreement. If the *Mayer* court accepted defendants' reading of the contract, it would have rendered part of the contract superfluous, whereas if the *Mayer* court accepted plaintiff's reading of the contract, certain language in the contract would have taken on a meaning in contravention of the common meaning of the wording of that language. (*Id.*) In the instant action, the wording of the agreement is unambiguous and not internally conflicting.

The *Mayer* court turned to the Third Circuit's opinion in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001 (3d Cir. 1980), for guidance in determining whether the wording in the agreement "reasonably admit[s] of different meanings." *Mayer*, 541 F. Supp. at 857 (quoting 619 F.2d at 1011). The *Mellon* court urged a judge

> to hear the proffer of the parties and determine if there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings.... If a *reasonable* alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder....

(*Id.*) (Emphasis in original).

In the instant action, both parties concede that the language of the termination clauses, which state that the employer may amend or terminate the Plans at any time, is unambiguous. The words themselves do not "reasonably admit of different meanings." Nor does this Court find that, in the absence of any wording in the Plans that even suggests it, it would be reasonable to believe that Western Union, which deliberately included the clauses in Plans which it drafted from scratch, intended to have the Plans vest at retirement. There is no reason why Western Union would not have included in its reservation of rights clause wording stating that the Plans would vest at retirement but could be altered or terminated before retirement if Western Union had meant such to be true. For these reasons, this Court does not find it a "reasonable" interpretation to

read the reservation of rights clause expressly allowing termination to mean just the opposite.

Because this Court finds that the Bankruptcy Court properly concluded that the reservation of rights clauses in the Plans could not reasonably be interpreted to mean that the Plans vested, this Court also finds that the Bankruptcy Judge was correct in precluding an evidentiary hearing on the intent of the parties. *Mellon*, 619 F.2d at 1011.

3. Proper Procedure for Terminating the Plans

The Plans provide that they may be amended or terminated by the Board of Directors. Appellants contend that the Plans were not properly terminated because they were not terminated at meetings of the full Board of Directors. (Appellants' Br. at 43). When she delivered her opinion from the bench on April 8, 1994, Judge Winfield found that New York Business Corporations Law, which the parties concede governs the Plans, authorized termination by means employed to terminate the SEBP and the Girardin Plans. (Bankr. Op. at 9-10). The SEBP Plan was terminated on December 26, 1991 by a resolution by consent of the members of the Board, in lieu of a formal meeting. The Girardin Plan was terminated by a resolution of the Executive Committee, by unanimous consent, on February 29, 1992. New York Business Corporations Law § 708(b) (McKinney 1986) authorizes a board to act through a designated executive committee. Based on these laws, this Court finds that Western Union properly terminated the SEBP and the Girardin Plans.

However, this Court also finds that the Bankruptcy Court's conclusion that no party had a claim because the Plans were properly terminated is clearly erroneous with respect to Mr. Girardin's entitlement to benefits during the period between December 31, 1991 and February 29, 1992. The Bankruptcy Court did not consider the fact that Western Union ceased paying benefits to Mr. Girardin on December 31, 1991, while it did not take action to terminate the Plan until February 29, 1992. Since appellee does not challenge the assertion that no formal action to terminate the Girardin Plan took place before February, this Court must conclude that Western Union was obligated to pay Mr. Girardin his benefits under the Girardin Plan until the date on which that Plan was terminated by proper procedures.

CONCLUSION

For the foregoing reasons, this Court reverses the Bankruptcy Court's determination of April 20, 1994 that Western Union was not obligated to pay Mr. Girardin's benefits under the Girardin Plan during the period from December 31, 1991 until the Girardin Plan was formally terminated on February 29, 1992. Benefits are due and payable for that two-month period; hence he may maintain his claim to that extent only. This court affirms the Bankruptcy Court's April 20, 1994 ruling in all other respects. This matter is remanded to the United States Bankruptcy Court for proceedings consistent with this Opinion.

JOHN W. BISSELL

United States District Judge

DATED: January 18, 1995

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	(Honorable Novalyn L. Winfield) In Proceedings Under Chapter 11
New Valley Corporation,	:	
Debtor.:	:	**Case No. 91-27704 NW**
	:	Hearing: February 18, 1994

ORDER DISALLOWING AND EXPUNGING CERTAIN PROOF OF CLAIM BASED UPON NEW VALLEY CORPORATION'S TERMINATION OF ITS SENIOR EXECUTIVE BENEFIT PLAN

New Valley Corporation, as debtor-in-possession in the above-caption chapter 11 case (the "Debtor") having filed its Omnibus Objection Number Five, dated December 15, 1993, to certain proofs of claim (the "Objection"), seeking to disallow and expunge the proofs of the claim set forth on Exhibit E annexed to the Objection; and

The Court hereby having found and determined that the Objection was properly served upon all necessary parties in interest, with adequate and sufficient notice of the Objection having been given pursuant to the applicable provisions of the Bankruptcy Code and Bankruptcy Rules 2002 and 3007, and pursuant to the Order Establishing Procedures for Objections and Settlement of Claims, dated November 12, 1993, and that no other notice is required; and

Claimant Russell W. McFall (claim number 1111) having agreed, through counsel, to be subject to the Objection; and

Claimant Richard L. Callaghan having filed an amended claim (claim number 1110) that is subject to the Objection; and

It appearing to the Court that all of these claims are based solely upon the Debtor's termination of its Senior Executive Benefit Plan; and

The Court having received extensive briefing from the parties, and heard oral argument on the Objection on March 4, 1994; and

The court having rendered a decision on the Objection at the April 8, 1994 hearing, and having read such decision into the record; it is therefore

ORDERED that notice and service of the Objection was adequate and sufficient.

IT IS FURTHER ORDERED that the twenty-three (23) claims attached as Exhibit A to this Order be and hereby are disallowed and expunged in their entirety pursuant to Section 502 of the Bankruptcy Code for the reasons stated on the record at the April 8, 1994 hearing.

Dated: Newark, New Jersey

April 20, 1994

United States Bankruptcy Judge

EXHIBIT A

Claim No.	Amount	Claimant	
222	0.00	D.H. Northington	SEBP
238	230,624.00	James T. Ragan	SEBP
275	94,077.00	Alexander J. Chisolm	SEBP
278	208,894.00	S.E. Smiszko	SEBP
281	95,062.00	John A. Hunt	SEBP
291	160,964.00	Arthur Garman	SEBP
305	152,981.00	Gerald P. Kent	SEBP
311	101,757.00	Delmar Harmon	SEBP
315	203,293.00	Robert F. Garbarini	SEBP
357	85,478.00	Walter L. Elkins	SEBP
385	467,958.00	Walter E. Giradin	SEBP
403	95, 206.00	Philip Schneider	SEBP
415	100,611.00	J. William Harrington	SEBP
417	134,450.00	John A. Hollansworth	SEBP
429	25,908.00	Richard L. Callaghan	SEBP
464	231,634.00	Bernard Weitzer	SEBP
646	7,486.68	John W. R. Pope, Jr.	SEBP
651	344,931.00	Robert M. Flanagan	SEBP

Claim No.	Amount	Claimant	
721	81,177.00	Douglas D. Lloyd	SEBP
930	229,780.00	H.E. Salter/Barbara Orr Salter	SEBP
1105	136,166.00	John E. Fox	SEBP
1110	286,522.00	Richard L. Callaghan	SEBP
1111	341,194.00	Russell W. McFall	SEBP

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
CASE NO. 91-27704

NEW VALLEY CORPORATION,

Debtor.

---/

DATE: April 8, 1994

BEFORE: Honorable Novalyn L. Winfield
United States Bankruptcy Judge

LOCATION: United States Bankruptcy Court
Federal Square, Newark, New Jersey

PURSUANT TO: Hearing Re: Oral Decision With
Respect to Omnibus Objection
No. 5 Re: SEBP Participants
and Richard Hostettler

* * *

MR. JACOBSON: Your Honor, the next item was the decision on the SEBP and Hostettler objections, and I guess that's up to you.

THE COURT: That I'm ready on.

Mr. Troublefield, as you will recall, primarily the last time we were here I wanted some additional time to review the sequence of events, as well as, frankly, to review the New York Business Corporation Law Section 708 and 712. I don't remember if I had directly addressed those sections with you, but at the time of the hearing, we had not been able to pull them off of Westlaw for me to actually read. It seemed a worthwhile endeavor. So I will, nonetheless, sort of begin at the beginning, because I don't believe I rendered a decision in any respect the last time.

This matter came before the Court as part of the New Valley's fifth omnibus objection to claims. In that fifth omnibus objection to claims, New Valley sought disallowance of various claims by employees, which had been participants in the senior executive benefit plan, as well as sought disallowance of the claim of Mr. Girardin, which was a separate plan.

It was New Valley's contention that it had previously terminated the benefits of these plans pursuant to the existing terms of the senior executive benefit plan and the Girardin plan.

When the matter came on before the Court, the parties, that is the claimants, had originally asserted that both plans were excess benefit plans.

It is my understanding that, as the matter progressed, and by the time we got to the last hearing, that objection was -- that contention was withdrawn, and the parties did, in fact, agree that these plans constituted what are known as top-hat plans, and, indeed, I think with some reluctance there was a concession by the claimants that the vesting rules of ERISA do not apply to these plans and the sponsor can reserve the right to terminate these plans.

Whether conceded by the claimants or not, this Court believes that, in fact, to be the state of the law, and I would cite you, for example, to the Payne versus RCA case for that statement.

And I think it is further supported by the Baroklou (phonetic) versus Kidder Peabody case, also a Third Circuit case, 752 F.2d 923. That case cites to the legislative history and notes that Congress didn't chose to grant a blanket exemption from ERISA, but, nonetheless, did grant certain exemptions to specific substantive provisions, one of which is the vesting provision.

All right. That I think gets us squarely to the issues raised by the claimants. In rendering its decision, the Court has entertained not only argument of counsel, but has, in particular, relied upon the submissions by the parties, specifically in particular the Boyle affidavit of 1/9/94. Mr. Poponski's affidavit -- I believe that was a February date that I don't have, but he only submitted one, so I don't think there's any confusion, and all of the attachments thereto.

Mr. Boyle's affidavit, beginning at Exhibit B and continuing through C, D and E, contains various versions of the senior executive benefit plan. And all contain, as does the Girardin plan, a provision that provides that the Board of Directors may amend or terminate the plan at any time for any reason.

Notwithstanding the language of the plan, the participants in the first -- well, first of all, the claimants attempt to create an issue as to whether or not they effectively received notice of the plan that contained that provision in it. I believe the affidavit of Mr. Boyle with the attachments thereto amply dispels that notion. There are attached to the various plans transmissions letters that indicate that the participants received these plans.

Secondly, the participants contend that, well, the termination statement may be there, but that's not what was understood by the plan participants. That statement is made in the brief in opposition. It is unattributed to any specific senior executive benefit plan member or Mr. Girardin and is unsupported by any certification, affidavit or anything that would lend any evidentiary value to that statement.

Secondly, in this Court's view, the construction of that language is plainly at variance with the terms in the senior executive benefit plan and the Girardin plan.

Further, it strikes the Court, one of the things I wish to emphasize, as is true with top-hat plans, these are plans primarily -- well, which are designed for the benefit of key or senior executives of a company, generally a group of individuals, and probably the best position in a company to negotiate clear and explicit terms of the plan, and if the parties had intended the restricted meaning of the language, argued for by the claimants, it would have been a simple matter to have drafted both the plan documents accordingly.

Finally, it makes no sense to this Court to suggest, as the claimants do, that the Court should be mindful of the purposes of ERISA and that, in large measure, it is designed to avoid the forfeiture of benefits, that the Court should interpret that broadly to include these top-hat plan benefits.

That is not sensible in light of the specific exemption of the top-hat plan from the ERISA statute.

The other thing the Court did, because part of the argument made was that the benefits were terminated and then there were the resolutions of the Board of Directors, the argument was two-fold, I think.

One, there was a suggestion, I am not sure it was made explicitly, but a suggestion that the resolutions of the Board of Directors could not ratify the earlier action taken.

Secondly, there was a section that the actions taken by the Board were not lawfully taken.

In that regard, in order to examine this, the Court prepared, in effect, for its own benefit, what I might characterize as a time line, and that would be roughly as follows:

On August 23rd of 1977 the senior executive benefit plan was created by the resolution of the Board of Directors. I believe that is attached as Exhibit A to Mr. Boyle's affidavit.

On July 24, 1979, the Girardin plan was also created by a resolution of the Board of Directors. That is Exhibit F to the Boyle affidavit.

Thereafter, various members of the participants in the senior executive benefit plan retired at various intervals. Mr. Girardin, it appears, retired January 1 of 1981.

Subsequently, with respect to Girardin, on December 20, 1991, he was informed of the Debtor's -- by letter of the Debtor's intention to terminate his retirement benefits. I think the letter incorrectly states that it is under Article 12 of SEBP, but I think Mr. Girardin understood the import of the letter.

December 26, 1991, there was a resolution of the Board of Directors by consent in lieu of a meeting to terminate the senior executive benefit plan, pursuant to the pertinent article of the plan.

There was, also -- and that termination provided that December 31, 1991 would be the effective date.

Then, on February 29, 1992, the Girardin plan was terminated by resolution of the Executive Committee of the Board of Directors, again by unanimous written consent in lieu of a meeting.

The document, as I indicated earlier, that is the plan clearly provides that they may be terminated or amended by resolution of the Board of Directors. Business Corporation Law Section 708, after this Court's review, does clearly permit the Board to take action by resolution adopted by unanimous consent in lieu of a meeting.

Similarly, business corporation law section 712 authorizes actions to be taken by an Executive Committee.

It appears to this Court that, in fact, the actions taken by the Board of Directors of New Valley were clearly authorized, and accordingly, the plans were terminated according to the termination clause in both the Girardin and the senior executive benefit plan.

As such, there is no basis for the claims asserted by either Girardin or the senior executive benefit claimants and, accordingly, those claims will be disallowed as requested by the Debtor.

And I think I had an order, Mr. Jacobson, but I Suspect in the struggle I've managed to misfile it, and I don't presently have an order, so I would ask the Debtor to submit an order on notice.

MR JACOBSON: We will submit an order. Your Honor will get it on Monday.

THE COURT: Okay.

(Whereupon the matter was concluded.)

ATTACHMENT "A"

SPECIAL MEETING OF THE BOARD OF DIRECTORS
OF
THE WESTERN UNION TELEGRAPH COMPANY

held, without prior notice, on July 24, 1979, at The Board Room, 280 Park Avenue, New York, New York.

There were present:

R. M. Flanagan, Chairman
H. E. Figgie, Jr.
E. D. Hilburn
T. W. Kheel
R. W. McFall
A. J. McMullen
D. H. Putnam
J. F. Rich

Absent:

W. E. Girardin

The Chairman of the Board presided and the Secretary recorded the minutes of the meeting.

The Chairman reported that he had been conducting a search for a senior marketing executive and he had made an offer to John E. Fox of Satellite Business Systems. Mr. Fox has accepted the offer, and it is recommended that he be elected an Executive Vice President of the Company.

After discussion, upon motion duly made and seconded, it was

RESOLVED, that John E. Fox
be appointed an Executive Vice President of the

Company, effective immediately, to hold office during the pleasure of the Board of Directors.

Mr. Putnam reported on a meeting of the Executive Compensation committee held earlier in the day. At that meeting, the Committee had accepted, subject to approval of the Board, the recommendation of the Chairman regarding a contingent supplemental pension benefit for Mr. Girardin, the President of the Company. Although Mr. Girardin is a participant in the Western Union Senior Executive Benefit Plan, that Plan will not provide any supplemental pension benefit since it is geared to participants with relatively short periods of service. On retirement, Mr. Girardin will have more than 40 years of service, most of which was accumulated while his salary was low by current standards. Consequently, his pension will not fully reflect his contribution to the Company.

After discussion, upon motion duly made and seconded, it was

RESOLVED, that Walter E. Girardin be granted a supplemental annual pension, payable upon retirement at or after June 1, 1980, equal to the difference between the annual pension payable under the Company's General Plan and 60% of his then current base salary; that such supplemental pension shall constitute an unfunded deferred compensation plan as described in Sections 201(2), 301(a)(3) and 401(a)(1) of the Employee Retirement Income Security Act of 1974, payable from general assets of the Company; and that the same joint and survivor options provided for under the General Plan of the Company shall also be applicable to this supplemental pension benefit; provided that, the Board of Directors may amend or terminate this supplemental benefit at any time for any reason and thereafter Walter E. Girardin and his estate and dependents shall have only such rights as shall be specifically provided for by the Board of Directors pursuant to such amendment or termination.

There being no further business, on motion duly made and seconded, the meeting adjourned.

September 21, 1979

TO: G. P. Kent

FROM: M. Jasko

The following resolution was adopted by the Board of Directors of The Western Union Telegraph Company at a special meeting held on July 24, 1979:

> "RESOLVED, that Walter E. Girardin be granted a supplemental annual pension, payable upon retirement at or after June 1, 1980, equal to the difference between the annual pension payable under the Company's General Plan and 60% of his then current base salary; that such supplemental pension shall constitute an unfunded deferred compensation plan as described in Sections 201(2), 301(a)(3) and 401(a)(1) of the Employee Retirement Income Security Act of 1974, payable from general assets of the Company; and that the same joint and survivor options provided for under the General Plan of the Company shall also be applicable to this supplemental pension benefit; provided that, the Board of Directors may amend or terminate this supplemental benefit at any time for any reason and thereafter Walter E. Girardin and his estate and dependents shall have only such rights as shall be specifically provided for by the Board of Directors pursuant to such amendment or termination."

WESTERN UNION CORPORATION

MEETING OF THE BOARD OF DIRECTORS

held August 23, 1977, at 11:00 a.m. at the Metropolitan Club, 1 East 60th Street, New York, New York, pursuant to notice given by the Secretary.

There were present:

R. W. McFall, Chairman

Selig Altschul

Harry E. Figgie, Jr.

Theodore W. Kheel

A. J. McMullen

Donald H. Putnam

John F. Rich

Harper Sibley, Jr.

Paul E. Wallendorf

There was also present by invitation Mr. R. M. Flanagan, Vice President-Finance and Comptroller of the Corporation.

The Chairman of the Board and President presided and the Secretary recorded the minutes of the meeting.

The minutes of the special meeting of the Board of Directors held on June 14 and 15, 1977 were approved, and the actions of the Executive Committee of the Board of Directors as reflected in the minutes of meetings of that Committee held July 12, 1977 and August 9, 1977, respectively, were, in all respects, ratified, confirmed and approved.

At the request of the Chairman, Mr. Flanagan presented a financial report of the operations of the Corporation and its subsidiaries for the seven months ending July 31, 1977, including a comparison with the results for the same period in 1976 and analysis of the variations from budget. He presented charts showing, both for the Corporation and its principal subsidiaries, operating revenues, pre-tax income and outstanding indebtedness.

Earnings for the seven month period were $1.58 per share (or 49 cents per share above budget) as compared with $1.20 for the same period in 1976. Revenues were 7.5% higher than in 1976 with capital spending running slightly below budget. Continuing shortfalls in revenues from the Telegraph Company's money order and WESTAR services have been offset by increases in Telex/TWX, private wire and MAILGRAM services. Expenses continue below budget despite the increased costs to the Bell System for leased facilities.

The Chairman suggested that consideration be given to the declaration of third quarter dividends. Mr. Flanagan presented a schedule showing (as compared with similar data for the third quarter 1976) estimated income available for dividends as of the end of the third quarter 1977 and the amounts required for such dividends, including both the Preferred and Common Stocks and assuming continuation of the thirty-five cents quarterly payment on each share of Common. At June 30, 1977, after giving effect to applicable dividend restrictions, retained earnings of $75,700,000 was available for the payment of cash dividends. The Chairman noted that the Board of Directors of The Western Union Telegraph Company had, on August 9, 1977, declared a dividend of $1.63 per share on its 5,000,000 Common Shares held by the Corporation, payable in two installments of $2,350,000 ($.47 per share) on October 1, 1977 and $5,800,000 ($1.16 per share) on October 15, 1977 to shareholders of record at the close of business on September 2, 1977. The cash requirements for the payment of third quarter dividends would be as follows:

ISSUE	PER SHARE	AMOUNT
4.60% Preferred 330,308 shares	$1.15	approximately $ 380,000
9.50% Preferred 750,000 shares	$2.375	approximately $ 1,781,000

4.90% Preferred $1.225 approximately $ 156,000
127,249 shares

Common Stock $ .35 approximately $ 5,306,000
15,159,781 shares

$ 7,623,000

The Chairman recommended that quarterly dividends be declared at these rates.

After discussion, upon motion duly made and seconded, it was

RESOLVED, that dividends for the quarter ended September 30, 1977 be, and hereby are, declared on the Corporation's Preferred Stocks as follows:

On the 4.60% Convertible Cumulative Preferred Stock, a quarterly dividend of $1.15 per share;

On the 9.50% Cumulative Preferred Stock, a quarterly dividend of $2.375 per share;

On the 4.90% Convertible Cumulative Second Preferred Stock, a quarterly dividend of $1.225 per share;

each payable on October 1, 1977 to stockholders of record at the close of business on September 2, 1977, and that sufficient funds for the payment of each such dividend be set aside.

RESOLVED, that a dividend for the quarter ended September 30, 1977 of thirty-five cents per share on the Common Stock of the Corporation be, and hereby is, declared payable on October 15, 1977 to stockholders of record at the close of business on September 9, 1977.

The Chairman asked Mr. Flanagan to preview the status of the trusts under the Corporation's pension plans and the performance of the various investment advisers managing the investment of the trust funds. Mr. Flanagan described the formula used in determining the value of trust fund assets for actuarial purposes and demonstrated its application to the Telegraph Company Plan Trust. Generally, the procedure

involves a five year averaging approach which disregards book value and spreads the impact of year-to-year stock market fluctuations. The total market value of all trust assets at June 30, 1977 was $84,617,684. Mr. Flanagan presented charts showing the performance of each separately managed fund for the first six months of 1977 and comparing earnings performance over an eight year period. Completion of the transfer of the funds in the Bankers Trust Company Trust to the four equity investment managers appointed in January 1977 has been delayed because a small portion of them are invested through a commingled trust in presently illiquid investments. These investments are earning satisfactory returns and it is proposed to defer their transfer to the mew managers until this can be done on an orderly basis.

Mr. Stephen E. Smiszko, Vice President and Treasurer, entered the meeting with Messrs. Hathaway and Glasberg of the Morgan Guaranty Trust Company who discussed with the Board Morgan's investment policy as applied to the Corporation's trust which is administered by them. Following this report, Messrs. Smiszko, Hathaway, and Glasberg left the meeting.

A general discussion concerning pension fund investment philosophy ensued. The Chairman suggested that the Board adopt a statement of investment objectives setting forth criteria for management of the trust funds under the Corporation's several qualified plans. He distributed a draft statement and requested that recommended changes be communicated to him prior to the next meeting.

The Chairman referred to the action taken by the Board at its special meeting held on June 14 and 15, 1977 authorizing the establishment of a short term revolving credit with the Toronto-Dominion Bank. Management recommends the establishment of a similar line in the amount of $5 million with the National Bank of North America. As in the case of the Toronto-Dominion Bank line, borrowing from National Bank of North America would be used to supplement fluctuating cash balances required as working capital.

After its discussion, upon motion duly made and seconded, it was

RESOLVED, that the Corporation borrow from National Bank of North America ("Bank"), from time to time on a revolving credit basis, amounts not to exceed $5,000,000 at any one time outstanding, repayable at such dates and bearing interest at such rates not to exceed one percent over the Company's prime rate, as may be mutually agreed upon on the date of borrowing; and that the Chairman of the Board and President and any Vice President each be authorized to execute and deliver on behalf of the Corporation such documentation consistent with the foregoing terms and such additional terms as the officer executing such documentation shall deem desirable; and that the Vice President-Finance and Comptroller, the Vice President and Treasurer and any Assistant Treasurer or any other person authorized for such purpose by the Vice President and Treasurer or any Assistant Treasurer each be authorized to borrow from the Bank and, in connection therewith, to execute and deliver notes evidencing such borrowings and take all such other action as may be reasonably requested by the Bank or as may otherwise be desirable in order to effectuate such borrowings.

Messrs. Flanagan and Hostettler left the meeting. The directors convened in Executive Session to further consider previously discussed proposals for a senior executive benefit program. The Chairman subsequently reported to the Secretary the deliberations and actions of the Board as follows:

The principal objective of such a program is to provide supplemental disability, retirement, and insurance benefits for key executives who have contributed significantly to the Corporation's improved performance, but who were recruited in mid-career and accordingly will not accrue sufficient tenure to be eligible for maximum benefits under the Corporation's existing qualified plans. The Firm of Booz, Allen and Hamilton had been retained to survey executive compensation practices in comparable industries and to compare them with the Corporation's existing program. Based on the Booz, Allen report (copies of which were distributed to the directors), the Executive Compensation Committee has recommended the granting of additional benefits to selected executives. A schedule showing the estimated costs of such benefits on stated assumptions was presented. It is proposed to pay these costs as annual operating expenses. The Employee Retirement Income Security Act of

1974 contemplates and excludes from its coverage non-qualified plans of this kind. Initial participation would be limited to designated officers of the Corporation and its designated subsidiaries. Future participation would be determined by the Executive Compensation Committee from time to time.

After discussion, the Board authorized the establishment of the Western Union Senior Executive Benefit Plan, to be effective immediately, containing the following principal terms:

Participation. Limited initially to officers of the Corporation and its principal subsidiaries named in Exhibit XI to the Report of Booz, Allen and Hamilton submitted to this meeting. Additional participation to be determined from time to time by the Executive Compensation Committee. Participants must also be participants in one of the Corporation's qualified contributory pension plans.

Supplemental Non-Contributory Pension Benefit. Participants retiring in accordance with the retirement provisions of a qualified pension plan will receive (in addition to the pension payable under the qualified plan) a supplemental pension computed on the basis of 1% for each year of service in a position evaluated in Grade 01 or above (up to but not exceeding the lesser of 20 years or such number which when added to years of service credit accumulated under the qualified plan aggregates 40) times Average Final Compensation as determined under the qualified plan.

Post Retirement Life Insurance Benefit. Participants retiring in accordance with the retirement provisions of a qualified pension plan will receive a life insurance benefit equal to twice the amount of the Participant's annual base salary at the date of admission to the Senior Executive Benefit Plan.

Medical Benefit. Participants (and members of their immediate family) retiring in accordance with the retirement provisions of a qualified pension plan and who enroll for Medicare Parts A and B coverage will receive a medical benefit providing for total coverage equivalent to the basic major medical and dental benefits currently provided to active employees.

Disability Benefit. Participants experiencing total disability will be entitled to receive 60% of base salary (after taking into

account benefits received under the Corporation's existing long term disability plans and any other benefits paid under Social Security or any other Government plan) until age 65 will continue to accrue credit for service for supplemental pension benefit purposes.

A definitive plan will be prepared and submitted to the Board for ratification.

There being no further business, on motion duly made and seconded, the meeting adjourned.

_____

Secretary

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5140

IN RE: NEW VALLEY CORPORATION,
Debtor

SENIOR EXECUTIVE BENEFIT PLAN PARTICIPANTS;
RICHARD L. CALLAGHAN; ALEXANDER J. CHISHOLM;
W. LEE ELKINS; ROBERT M. FLANAGAN;
ROBERT F. GARBARINI; ARTHUR A. GARMAN;
WALTER GIRARDIN; DELMAR HARMON;
J. WILLIAM HARRINGTON; JOHN P. HUNT;
JOHN A. HOLLANSWORTH; GERALD P. KENT;
D.D. LLOYD; RUSSELL W. MC FALL;
JOHN W.R. POPE, JR.; HERBET SALTER,
Estate of; STEVE SMISZKO; PHILLIP SCHNEIDER;
BERNARD WEITZER

v.

NEW VALLEY CORPORATION

Senior Executive Benefit Plan Participants
and Walter E. Girardin, Alexander J.
Chisholm, S.E. Smiszko, John A. Hunt, Arthur
Garman, Gerald P. Kent, Delmar Harmon, Robert R.
Garbarini, Walter L. Elkins, Walter E. Girardin,
Philip Schneider, J. William Harrington, John A.
Hollansworth, Bernard Weitzer, John W.R. Pope,
Jr., Robert M. Flanagan, Douglas D. Lloyd, H.E.
Salter/Barbara Orr Salter, Richard L. Callaghan,
and Russell W. McFall,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 94-cv-02405)
BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON
MANSMANN, GREENBERG, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS, MCKEE,
Circuit Judges

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated:

PART 2--PARTICIPATION AND VESTING

§ 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than--

(1) an employee welfare benefit plan;

(2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

(3)(A) a plan established and maintained by a society, order, or association described in section 501(c)(8) or (9) of Title 26, if no part of the contributions to or under such plan are made by employers of participants in such plan, or

(B) a trust described in section 501(c)(18) of Title 26;

(4) a plan which is established and maintained by a labor organization described in section 501(c)(5) of Title 26 and which does not at any time after September 2, 1974, provide for employer contributions;

(5) any agreement providing payments to a retired partner or a deceased partner's successor in interest, as described in section 736 of Title 26;

(6) an individual retirement account or annuity described in section 408 of Title 26, or a retirement bond described in section 409 of Title 26 (as effective for obligations issued before January 1, 1984);

(7) an excess benefit plan; or

(8) any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

PART 3--FUNDING

§ 1081. Coverage

(a) Plans excepted from applicability of this part

This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than--

(1) an employee welfare benefit plan;

(2) an insurance contract plan described in subsection (b) of this section;

(3) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;

(4)(A) a plan which is established and maintained by a society, order, or association described in section 501(c)(8) or (9) of Title 26, if no part of the contributions to or under such plan are made by employers of participants in such plan; or

(B) a trust described in section 501(c)(18) of Title 26;

(5) a plan which has not at any time after September 2, 1974, provided for employer contributions;

(6) an agreement providing payments to a retired partner or deceased partner or a deceased partner's successor in interest as described in section 736 of Title 26;

(7) an individual retirement account or annuity as described in section 408(a) of Title 26, or a retirement bond described in section 409 of Title 26 (as effective for obligations issued before January 1, 1984);

(8) an individual account plan (other than a money purchase plan) and a defined benefit plan to the extent it is treated as an individual account plan (other than a money purchase plan) under section 1002(35)(B) of this title;

(9) an excess benefit plan; or

(10) any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for

benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

PART 4--FIDUCIARY RESPONSIBILITY

§ 1101. Coverage

(a) Scope of coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than--

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

PART 5--ADMINISTRATION AND ENFORCEMENT

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter

shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
CASE NO. 91-27704
----------/
NEW VALLEY CORPORATION,

Debtor.
----------/

DATE:March 4, 1994

BEFORE:Honorable Novalyn L. Winfield
United States Bankruptcy Judge

LOCATION:United States Bankruptcy Court Federal Square, Newark, New Jersey

PURSUANT TO:Court Calendar

AMERICAN AUDIO TRANSCRIBING, INC.
5 BECKER FARM ROAD
ROSELAND, NEW JERSEY 07068
(201) 740-1804

A P P E A R A N C E S:

AKIN, GUMP, STRAUSS, HAUER & FELD, ESQS.

BY:JONATHAN M. JACOBSON, ESQ.

-and-

MICHAEL STAMER, ESQ.

-and-

DAVID BRECKER, ESQ.

Attorneys for the Debtor

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS.

BY:MYRON RUMELD, ESQ.

LATHAM & WATKINS, ESQS.

BY: ALAN BUSHLOW, ESQ.

Attorneys for Official Committee of Senior Secured Noteholders

RAVIN, SARASOHN, COOK, BAUMGARTEN, FISCH & BAIME, ESQS.

BY:ROBERT A. BAIME, ESQ.

-and-

BRUCE BUECHLER, ESQ.

Attorneys for the Unsecured Creditors Committee

WEIL, GOTSHAL & MANGES, ESQS.

BY: MARTIN J. BIENENSTOCK, ESQ.

Attorneys for the Statutory Unsecured Creditors Committee

CARELLA, BYRNE, BAIME, GILFILLAN, CECCHI, STEWART & OLSTEIN, ESQS.

BY:GLENNON G. TROUBLEFIELD, ESQ.

-and-

JEFFREY A. COOPER, ESQ.

Attorneys for the SEBP

RODERICK METTE, ESQ.

Attorney for the SEBP

THE COURT: Sure.

Okay. Bear in mind, I think I've read all the submissions, including the most recently filed submissions, so I don't need you to review each and every piece, although I have to tell you, as I was reading these again last night, when I started practicing law early on, I learned that there were two areas I never wanted to do, matrimonial and ERISA.

Why am I doing so much of this now? I can't say I enjoyed any trip through the statute. But I have looked at the issues, and I have looked at all the pleadings, so I would ask you to focus, most particularly with respect to the most recent submission, their response to the Debtor's reply, if you would, Mr. Rumeld.

MR. RUMELD: Okay. Thank you, your Honor. I think, frankly, as your Honor seems to recognize, there's been a metamorphosis in the position of the participants here, and I really think that that just confirms that what they are doing is unsuccessfully groping for a legal theory to support the factual assertions which, incidentally, are made in the brief, but there aren't any affidavits.

I don't really think it matters, because the essential problem with their case is the law is very clear on what the Court can consider and what it can't consider.

As I understand the reply papers, there's no longer any state law issues. What the claimants are really trying to do is get through the back door state law claims under the guise of ERISA federal common law.

Now, the claimants are right that there is a notion of common law under ERISA, and the purpose of that common law is generally to fill the gaps in the statute.

We don't really have a gap in the statute here. We have a purposeful intent by Congress to distinguish between the types of plans, like ordinary pension plans, where vesting requirements are provided by the statute, and other types of plans, like the health plans that I know the Court has visited before, and these unique types of top-hat plans, where Congress purposefully decided not to have vesting -- statutory vesting provisions.

Quite frankly, that puts the participants in those plans in a very different position.

The law has also recognized -- the common law that has developed under ERISA has recognized that there are circumstances in which retirees could keep benefits, and where they may have a contractual vesting right. But those same cases are very, very clear about the fact that the employer can reserve the right to terminate those benefits, and where it does so, in the plan, in the plan language, that is really the end of the inquiry.

The Court is not supposed to consider any extrinsic evidence, and there is no such thing as promissory estoppel claim under federal common law, that's simply based on assertions of oral discussions or allegations of that nature. That's really all we have here.

I think the plan language is very clear. The company reserves the right to terminate the plan at any time.

Now --

THE COURT: What about their allegation that the company didn't make that sufficiently clear in any summary plan description or SPD, I guess we can call it.

MR. RUMELD: Well, that's why, and I do apologize for the, you know, it is normally not my practice to do a surreply paper, but I really thought here the reply papers were in a sense like the moving papers.

I think that the letter -- you know, they speak in terms of a summary plan description that they received. We don't -- none was attached. I am assuming, and that's why I submitted it, that what they must be referring to is this cover letter with a brief description that preceded the codification of the plan.

I think it is very clear in there that what was distributed at that time was not meant to be the plan.

In pertinent part, the cover letter says, attached is a brief outline of the major provisions of the plan, the complete details and controlling provisions will be included in the formal plan documents.

I don't think there is any mistaking what the formal plan document said.

In the affidavit that we earlier submitted from Mr. Boyle, I think we also made pretty clear that everybody either definitely got the

plan, in light of the passage of time, there seems to be some little problem with the records for a couple of people, but all the people were clearly on notice, and if you think of who the people we are talking about here, there really can be no question about a problem in terms of people not having an opportunity to see what the formal plan documents said.

I point out here also, your Honor, that there is reference in the reply brief that perhaps the Court should distinguish this type of plan from the welfare plans, from the health plans, where admittedly much of the case law is involved with health plans and not this unique type of plan.

I would suggest that, if anything, this is the clearer case. In the health plan situation, the typical employee who comes before the Court is one who may be a run of the mill employee, a lower level employee, who claims that, gee, when I retired, I assumed I could get health benefits for the rest of my life.

Notwithstanding the Court's sense of the equities in those circumstances, I think the cases are very clear that the purpose of ERISA was to be very specific on this issue and to make sure that the plan documents control.

Certainly, if in that instance that is the law, it is definitely the law in this instance where we have a plan that has been carved out of ERISA's vesting provisions, precisely because the only people that participate in this plan are a group of highly compensated senior people who can understand what is going on and who can plan appropriately.

That is the reason why the vesting provisions don't apply to this plan in the first place.

The claimants have also suggested that the plan language is not so clear, and maybe it means that the company only reserves the right to terminate prior to their retiring.

Every one of the cases, the circuit court cases, including, for example, the Alday case, I think the Musto case, the ones I have cited in our brief, they all have language that is virtually identical to this one where it simply says terminate at any time.

And, in all of those cases, the termination was post retirement. So I really think, just by virtue of the cases, that argument doesn't hold water.

I also don't think it makes much sense because, quite frankly, the language would have no meaning if it merely reserved the right to terminate before retirement.

Before retirement, the company would have had that right, in any event, since there is no ERISA vesting under this plan. The only way one could possibly vest contractually under the cases is by retiring. So the company wouldn't have had a need to reserve a right to terminate before.

And, also, if you look at the language it talks about reserving the right to terminate vis-a-vis the rights of the participants, or their beneficiaries, which would certainly suggest that it was a post retirement thing.

I would also point out, in that regard, I think the Musto case it was, there was a very similar argument made. I believe it is at page 901 of the decision, 901 or 902, but I think a very similar argument was made that maybe the reservation didn't apply to retirees, it only applied to the active employees, and it was pretty much rejected out of hand.

Finally, I think the last attempted ambiguity that the claimants raise is as to whether we effected the termination appropriately. We tried to address that in the other affidavit submitted yesterday.

I think it is very clear, both as a matter of the applicable corporate law, for which I don't claim to be an expert, but I think it is pretty clear that the Board of Directors, which was given the authority to terminate the plan, certainly had the authority under the law, and pursuant to its bylaws to terminate the plan pursuant to a consent, unanimous consent of the Board of Directors.

And, similarly, in the case of the separate Girardin plan, that it could do so by virtue of a subcommittee that had been appointed by the Board. I think that issue has been removed as well.

In short, there are a number of alleged ambiguities by which the claimants are trying to get a hearing out of this thing. The whole purpose of the statute and the laws that have come out of the statute is to avoid having a hearing, if the plan language is clear.

Every case that involves some claim for retiree benefits like this one, there is some sort of argument that someone was confused and someone was misled.

I don't really think the framers of ERISA were looking to come down on everybody so harshly, but I think they recognized, and I think there is a lot of discussion in the statutory history, that employers are not required to have these plans in the first place. If they want to encourage employers to have these plans, they have to have clear rules that give the employer some protections, too.

And here the employer did the right thing. It reserved to itself explicitly in the plan document, through its directors, the right to terminate this plan, and under those circumstances that right should be enforced without having a hearing and without looking at any other evidence.

Thank you.

THE COURT: Well, hang on a second. What about their argument that, wait a second, these plans aren't just purely a voluntary offering by the company?

I get a sense the argument is that they were bargained for by these senior executives, and I think the thread that that runs through is then, since they were bargained for, and we understood these to give us these post-retirement benefits, the -- I think it goes, in part, to their estoppel argument.

MR. RUMELD: I think it goes to -- as I understood, it goes to their estoppel argument. I don't think it is an argument that is much different than an employee makes in the retiree health benefit case, that a reason for them continuing in their employment through a certain date, that part of the consideration was the expectation of retirement benefits.

I think, in fact, one of the cases they cite, the White Farm case, which was one of the earlier cases on that subject, addresses that. But what the White Farm case makes clear, is that if the plan language is clear, you don't look at that stuff. If the plan language is ambiguous, then we do something that is more akin to the traditional state law analysis of promissory estoppel or consideration for a contract. But where the plan language is clear, in light of ERISA preemption and the desire to have the plan language

constitute the contractual provision, that is it. That is all we are supposed to look at.

So they may have bargained for a whole number of things in a package here, but insofar as they claim that they bargained for these benefits, what they bargained for is what was stated in that plan, and that plan governs as to that.

Thank you.

THE COURT: Thank you.

MR. METTE: May it please the Court. Essentially, New Valley's argument, as I understand it, is first they say estoppel is not permitted in ERISA cases.

Now, that is just plain wrong.

I mean, the -- as we show on page 13 and 14 of our supplemental memorandum, first the Third Circuit has held that both promissory estoppel and equitable estoppel are components of the federal common law in ERISA cases.

They have limited those to extraordinary circumstances, but those were for reasons that were not applicable to top-hat plans, of this type of top-hat plan, an unfunded top-hat plan.

The first concern -- the first concern is that ERISA -- that, by granting estoppel, the funds out of a trust fund may be distributed to parties that aren't entitled to it, entitled to the money under the strict terms of the trust. And it may then threaten the actuarial soundness of the trust. Of course, there is no trust fund.

And the second argument is based on section 402 of ERISA, which requires that -- that the -- that most plans be established and maintained by a written document, and that also requires that specific provisions be established for modification amendment of plans.

Well, in this case, top-hat plans are not subject to section 402. They are not required to be maintained in writing, and, in effect, all the cases cited by New Valley are distinguishable on that point alone.

I may also say that the estoppel we are claiming here is the type of estoppel that is of a representation of an interpretation of the agreement, which is an exception even for plans under 402 that are covered by 402, you know, in the Cane case.

Now, they also say that the parties had -- the participants had fair notice of the -- that the company was reserving a right to terminate their benefits after they retired.

Now, that is also not true, and if you could bear with me, I would like to go into the facts in some detail. Because assuming that they ever had -- that the -- assuming that the company did have the -- did reserve a right to terminate the plan, they certainly did everything they could to conceal that.

THE COURT: Let me ask you a question. Do you see any ambiguity in the language of this Article 12 of the plan?

MR. METTE: Yes, I do.

THE COURT: On the face of the language?

MR. METTE: No. The way I look at it, language only has meaning in context. Like, if criminals are arguing and one says I am going to kill you, that means one thing. But if a mother says the same words to her child who is misbehaving, it means something else.

Now, in this case --

THE COURT: So you are saying to me I can't read this document, this contract, let's call it a contract for now, putting aside whether it is a plan under the ERISA statute, I can't read the terms of this contract without reference to the context in which it was bargained for and executed or agreed to, promulgated let's use, by the company?

MR. METTE: I think in all contracts that should be the case. I mean, obviously some contracts their purpose and everything are clear on the face of it.

THE COURT: Well, isn't it the usual accepted approach to construction, that is if the language of a clause is clear on its face, you don't go looking at all these other --

MR. METTE: You don't look --

THE COURT: -- factors?

MR. METTE: -- at other interpretations, but you still have to look at the context to see if it is clear on its face. It has to be clear in the context, is what I am arguing.

Now, also, of course, the -- in this case the company never -- initially never itself construed this language as being -- as allowing it to terminate the plans after retirement

THE COURT: How do I rely on do I know that?

MR. METTE: If you allow us to have an evidentiary hearing, we can bring testimony in.

THE COURT: Why isn't there anything other than the statement in the brief that says that? I don't have any affidavit from anybody that says I spoke with Mr. Walters or any other officer.

MR. METTE: Well, you have a --

THE COURT: -- he said to me so it is so.

MR. METTE: I have -- one of the problems we had is I got into this late. We are talking about a -- a group of pensioners that are spread out all over the country. We don't have -- all the affidavits aren't available.

I do have -- there was an affidavit before the Court, not submitted by us, but by Mr. Hostetler in his own, in reference to his own claim. And Mr. Hostetler states that he was present when the executive benefit plan was established by the Board of Directors. Mr. Hostetler was the general counsel, he probably drafted the plan. And secretary. And he states that the company -- that the Board itself did not -- had some discussion of what the meaning of that plan -- Article 12 was, and they considered it boiler plate language, which would allow future amendments and possible termination. But that they did not believe that that language would give them authority, and they didn't intend to retain authority, or discretion to terminate the plan to in any extent -- which would create a forfeiture.

In other words, after the --

THE COURT: So you are relying on part on the Hostetler affidavit.

MR. METTE: I do have, in my briefcase, which of course I haven't submitted yet, I am hoping we can get beyond this hearing and get to more evidentiary hearings, I do have affidavits of Mr. Kent, who was the vice president of employee relations, who was a --

THE COURT: Okay. Well, I don't want to belabor the point. You argued to me that you have affidavits from other parties and --

MR. METTE: I can get more. I can get more.

THE COURT: Sir. Sir, hang on. Which would indicate --

MR. METTE: Would indicate the following. Okay?

THE COURT: Bear with me. I would like to move this along. Which would indicate that these parties had conversations with --

MR. METTE: They would indicate --

THE COURT: -- executives of New Valley --

MR. METTE: They would indicate --

THE COURT: -- Corporation wherein it was represented to them by the corporation that --

MR. METTE: Yes.

THE COURT: -- they did not intend --

MR. METTE: It also --

THE COURT: Sir, please

MR. METTE: Okay. Sorry.

THE COURT: This would not indicate that -- now you have me confused.

MR. METTE: Sorry.

THE COURT: That this termination provision was not intended to provide that benefits would be terminated post retirement?

MR. METTE: Right. This was --

I think it is a whole circumstance. If you would allow me to go through it, I want to --

THE COURT: No. I get the understanding of what you would like to show me. You can go on.

MR. METTE: I am also going to show you that the -- that the parties received -- after -- they received a summary statement of the plan, which is a detailed summary. Actually, it is longer than the plan itself. And of the provisions, and this summary --

THE COURT: Is there something other than the one just recently attached to the --

MR. METTE: It is not in any of his. It is attached to -- it is attachment C to Mr. Chisolm's proof of claim. It is the same summary.

This summary did not make any reference to a reservation to terminate. When -- and when the parties didn't receive a copy of the plan until some nine months later, this is after it was adopted, they never received it until nine months later, and I might add --

THE COURT: But they do --

MR. METTE: All parties never did receive a copy of the plan either.

THE COURT: Who do you say didn't get the plan?

MR. METTE: Well, Mr. McFall and Mr. Garmen. And then there are others like Mr. Chisolm who received a letter, to the best of his recollection he never received the plan. I see the letter saying he received the plan, but he is careful of his files and he didn't receive the plan.

THE COURT: Okay.

MR. METTE: And the gist of it will be that, when Mr. Kent -- when the plan was finally furnished to the participants, Mr. Kent was designated in the letter, furnished in this covering letter, Mr. Kent was designated as the person they should contact if they had any concerns with the provisions in the plan. They did contact Mr. Kent, and Mr. Kent told them they have nothing to worry about.

Now, I think there's two things we do have there. I think this is a -- certainly this, I think -- we have a -- in this case a clear case, I think it just cries out for estoppel, because the participants relied on a representation that they were secure after they retired, and these representations were from the very people who they were supposed

to rely on. They were from the general counsel who drafted the plan, from the executive of employee relations, from the CEO of the company, and the employees that they did rely on this plan.

They have secure jobs, they work for Western Union, they uprooted their families to move to New Jersey to take employment. They took early retirement in relying on the increased benefits that they would get. They elected self only, rather than survivorship annuity in reliance on the death benefits that were offered under the plan as providing security for their wives.

And when this benefit was terminated, it was too late for these people, who were already retired, and elderly, to obtain substitute life insurance to protect their wives at a reasonable rate.

So, in conclusion, we do submit that this objection should be denied, and participants claims should be granted. As a minimum, we submit they should be given the opportunity to present evidence in proof of their claims, in an evidentiary hearing.

THE COURT: Well, when you say proof of their claims, you mean proof that --

MR. METTE: Well, proof of the -- proof by the witnesses, proof of the -- proof of the representations, and their reliance on those representations.

THE COURT: Okay. Let me ask you another question.

In the brief, one of the points argued is that --

MR. METTE: Our brief?

THE COURT: Yes. Your brief. I'm sorry. I'm sorry I don't recall what page it was on. But there is a reference to -- there is a concession, if you will, that top-hat plans are not subject to the vesting requirements, but then there is an argument that, nonetheless, there ought to be a less stringent burden of proof for parties to demonstrate that the beneficiaries, and I guess the company, it is somewhat unspecified, intended that the benefits vest. How do I get to that?

MR. METTE: All right. We get to that because when -- in the case of medical benefit plans --

THE COURT: I'm sorry. That was at page 10 of your brief.

MR. METTE: Um-hum. Yeah.

THE COURT: The last portion of the first paragraph on that page.

MR. METTE: Um-hum. Okay. Well, in the case of medical benefit plans, as your Honor recognized in denying the section 1114 relief to the Western Union retirees, there are practical difficulties in vesting for the company. They don't -- the company can't possibly know what they are getting into. And so those types of plans normally don't vest, and the participants and the parties don't expect them to.

But for a pension plan, the parties do expect them to vest. They do expect that when they work until retirement, they are going to get a pension.

Now, it goes under the circumstances of all these difference plans, and under these circumstances, as I say it should take a lesser burden to -- for the Court to define that vesting was intended, than under a medical benefit plan where it is normally -- vesting wouldn't be intended.

THE COURT: What about the fact that these kinds of plans are specifically exempted from the usual vesting requirements, and the reason they are accepted is because it is not the usual -- in a sense the usual bargain that Congress wanted to protect.

MR. METTE: Well --

THE COURT: Congress, in effect, with ERISA, figured that there was a bargain between the employer and employee that ought to be protected.

MR. METTE: Right.

THE COURT: And, you know --

MR. METTE: Well, no --

THE COURT: In order that the future security of the employees have some meaning.

MR. METTE: Um-hum. Well, as in --

THE COURT: But these were excepted, and as I read it they were accepted because Congress viewed these top-hat type plans as the kind of -- I am going to say a more equal bargaining, that is that the parties who would be the beneficiaries of these plans were

relatively more sophisticated, more able to protect themselves, and, therefore, they didn't need a congressional statute and, in a sense, compulsory vesting to protect them.

So, in light of all of that, how do I get to a less stringent standard?

I would argue to you almost the medical benefits are in a better position for that argument than the top-hat plan participants.

MR. METTE: Well, neither. I don't think in either case, if you look at the White Farm case, which is cited in our brief, and just mentioned by opposing counsel, and other cases, in no case did the Congress, by exempting welfare plans and top-hat plans from the vesting provisions, express an intent to favor forfeiture.

All it did is, for these plans, the companies have to have flexibility in establishing -- and the employees, too, in establishing whatever rights there are by contract.

So what I am arguing is, under normal contract law, the -- you would interpret the contract according to circumstances under which it was planned, and you would -- and for a pension plan, which normally you would expect to be vested, perhaps there would be -- the proof need not be as great.

THE COURT: Okay. Thank you.

MR. METTE: May -- if I can just mention one thing.

THE COURT: Sure.

MR. METTE: About Girardin plan, you know, the Girardin plan we also present evidence that we have it from Kent who drafted that, that they did not intend the language in the proviso reservation of authority to amend or terminate in that plan either as a reservation to terminate after Mr. Girardin had given the bargained for labors that he was entitled to, because he bargained, as you recall in that case, he actually bargained with the company, they wanted him to stay another year, he wanted to retire, and he said, well, I'll stay another year if you beef up my retirement, and they did. And it was -- there was no intention there to allow the company to divest later on.

I also would mention one thing in Mr. -- you will notice a small point really, but I will conclude with it. Mr. Girardin -- let me look at this thing.

When -- Mr. Girardin was told he was -- his plan was terminated, he said it was terminated December 31, 1991, and it was terminated at that time. In spite of the fact that he notified them that he was under a different plan and that a Board resolution terminating the senior executive plan would not terminate his plan. All the company did after that is that they got around to, in effect, having the Board resolution terminating his plan effective February 29, 1992. That is Exhibit K to Mr. Boyle's affidavit.

Well, in fact, Mr. Girardin received no pension benefits either for January or February of that year.

THE COURT: Okay. Let me ask one final question of you.

MR. METTE: Sure.

THE COURT: That is a point on the Girardin matter.

About if I understand the position of the SEBP participant claimants now, and that of Mr. Girardin, essentially what they argue to me is -- let me ask you, do you concede that the Board of Directors' resolutions were sufficiently authorized in light of Mr. Boyle's most recent submissions?

A VOICE: Mr. Troublefield will speak to that. Your Honor, I am -- frankly, I was just prepared to speak on the ERISA issues.

THE COURT: But, essentially, then, from an ERISA standpoint, you argue estoppel really.

MR. METTE: I have two things --

THE COURT: Based upon the --

MR. METTE: I have two arguments. Maybe you don't -- two arguments that under all the circumstances the plan should not be interpreted as allowing the benefits to be terminated after retirement; and, two, that in light of the representations and the promises, there is a clear case of estoppel here.

THE COURT: Okay.

I'm sorry. I didn't mean to reduce them to one argument. I viewed them as one, perhaps different parts of one.

* * *

MR. RUMELD: Your Honor, I have a tremendous temptation to respond somewhat emotionally to the use of all these factual allegations where there was plenty of opportunity to put them in the appropriate form of an affidavit, etcetera, but I am going to resist that temptation, because I feel very strongly that the appropriate thing to do here is look first at the legal issues and decide whether any of these factual allegations bear any relevance, because ultimately, unless they support a legal theory, it doesn't matter, and the point of the briefing is to determine whether there is any circumstance under which the factual allegations can be relevant.

My adversary referred to page 13 and 14 of his brief supporting the proposition that there is an inequitable estoppel claim.

If the Court would examine those cases they, in fact, confirm that the only time you look beyond the language of the plan, is if the language of the plan is ambiguous. The language of the plan is not ambiguous. I don't even understand my adversary to be contesting that at this moment, because what he seems to be saying is he wants you to look at all the circumstances, then you would see there is an issue to try to have a hearing for.

But the point of all these cases is you first look up the language of the plan, and unless that language is ambiguous, that's as far as we go, and that is really the simple answer to their claim, whether it was in an affidavit or not, whether it is an estoppel claim or whether it is a contract claim under all the circumstances.

None of these cases say otherwise, and to the extent it looks like some cases say otherwise, the simple answer to that is that there are a number of cases that have been cited here that are pre-ERISA cases and say so.

The Cane case that is quoted at length there, in fact, if you examine the case, makes it very clear that the whole predicate on which the Court is preceding is the ambiguity in the language of the plan, and the cases that they rely on and that the other cases rely are, the Notwalter (phonetic) case that is cited there, that is the case that is, frankly, repeatedly cited including in the Alday case that I have relied on for the proposition that absent ambiguity you rely only on the language of the plan, and only where there is ambiguity, you go and look at other circumstances.

So it doesn't really matter what kind of offer of proof he wants to make. The simple fact is, as a matter of law it is not admissible because the plan language is clear and it doesn't give a claim where none exists.

Secondly, there is an argument based really on distinguishing the cases rather than citing any cases that the situation is different here because we are dealing with a top-hat plan and not a health plan.

I think, frankly, the Court has already indicated why that is a distinction without a difference, or even worse that the case is stronger here with a group of retirees who were the leading people in the company, were the people who ran the company, and thus were purposefully carved out of the vesting provisions.

The fact that there isn't a fund, while there is some dicta in one of the cases, I think the Rosen case, that suggests one of the reasons why the law is this way is because of the actuarial soundness of the plan, there is also plenty of discussion about the point that I made before, which is that employers create the plans and, therefore, they are entitled to create the conditions under which those plans operate.

Quite frankly, even in the welfare cases whether they are funded welfare plans or unfunded welfare plans, if the Court would make a ruling that finds liability, the employer would have to make good the money, and the purpose of adhering to the plan rules is not only so that the fund assets not be exceeded, but that the plan's sponsors have some sense of certainty when they create this plan to begin with.

There was a reference to the Hostetler affidavit. I just wanted to make sure, or the claim and the affidavit.

We didn't specifically address that here because, frankly, the story with him was a little different because we understood his claim to also refer to an employment claim.

I think that is going to be dealt with separately by my co-counsel but, in fact, as I understand the facts, the fellow signed a release that made it very clear that he has no claims other than what arises under the SEBP, and I think when we are finished disposing of this issue today, it is my hope there wouldn't be any claim under the SEBP either.

And, lastly, with respect to this issue of the -- of whether the law or the facts permit us to terminate the plan in this way, insofar as the allegations were already stated in the papers, I really think we have addressed them. We have gone to the trouble of putting in an affidavit, the facts sufficient to make clear that the company did what the law authorizes it to do, and the result of that is that the consent of the Board is as if the Board sat in a meeting and met. That's the purpose of the corporate law provisions, as I understand them. And I don't think there is any mistaking what the facts are based on the sworn affidavit of Mr. Poposki.

If there are any remaining issues about the timing of the termination, frankly, we will have to deal with them separately, but I don't think there is anything wrong with a resolution that confirms what's, in fact, already been decided.

Thank you, your Honor,

THE COURT: Okay, I have a partially -- actually, I intended to give you an oral decision today. I think I still could, but for some of the quibbling over the timing of the resolutions and relationship to the terminations.

Accordingly, so as not to leave a dangling issue, I will give you a decision very shortly that will encompass all of it. Quite frankly, I need to do my time line for those parts of it. I didn't focus on that as completely as the parties did in argument for me, before me today, and just so I have a complete opinion, I think I ought to include that as well. So I am going to reserve on this for a very brief time period, and I will give you a decision shortly.

Thank you.

* * *

WESTERN UNION CORPORATION
SENIOR EXECUTIVE BENEFIT PLAN

1. PURPOSE. The Senior Executive Benefit Plan is established for the purpose of providing supplemental retirement, disability, and medical benefits to a key group of management employees.

2. DEFINITIONS.

The Plan - The Western Union Corporation Senior Executive Benefit Plan adopted by the Board of Directors on August 23, 1977.

The Corporation - Western Union Corporation.

The Committee - The committee referred to in paragraph 7 of the Plan.

Basic Plan - The Pension Plan for Employees of Western Union Corporation and Participating Subsidiaries and Affiliates; The Western Union Telegraph Company Pension; The Western Union Telegraph Company Contributory Supplemental Retirement Plan; and any other qualified pension plan adopted by the Corporation or any of its subsidiaries from time to time in which a Participant is eligible to be a member. A Basic Contributory Plan is any Basic Plan (or that portion of a Basic Plan) in which a Participant is eligible to be a member upon the payment of contributions to such Plan.

Participants - Officers, who are also employees, of the Corporation and any of its subsidiaries who have been designated by the Board of Directors or by the Committee to participate in the Plan. The participation of any Participant will terminate upon the termination of his employment for any reason other than disability

or death or retirement on a pension (other than a deferred vested pension) under a Basic Plan. The participation of any Participant may be terminated by the Committee with or without cause at any time. After participation is so terminated. former Participants will have no rights under the Plan.

Credited Service - Service as a corporate officer of the Corporation or any of its subsidiaries.

Total Service - Continuous service (including Credited Service) as an employee of the Corporation or any of its subsidiaries.

Average Final Compensation - Average annual compensation during the five consecutive years of service producing the highest result.

3. SUPPLEMENTAL PENSION BENEFIT. (a) A Participant will be eligible to receive a supplemental pension benefit if two conditions are met:

(i) While a Participant in the Plan, the Participant must also, if eligible, be a member of a Basic Contributory Plan. If an eligible employee is not a member of a Basic Contributory Plan at the date of his admission to the Plan, and does not elect to become a member of a Basic Contributory Plan promptly thereafter, his Credited Service shall be limited to service accrued after the date he does so elect.

(ii) The Participant must retire and receive under a Basic Plan a pension other than a deferred vested pension.

(b) (i) The annual supplemental pension benefit payable to an eligible Participant will be calculated (before any adjustments

for an optional form of pension payment selected by the Participant under the Basic Plan) as follows:

(Y) If Total Service is less than 40 years, one percent of Average Final Compensation multiplied by the lesser of (I) the number of years of Credited Service, or (II) the difference between 40 and the number of years of Total Service; which product is subject to reduction under subparagraph (b)(ii) below.

(Z) If Total Service is 40 years or more, no supplemental pension benefit is payable.

(ii) The supplemental pension benefit calculated under subparagraph (b)(i) above will be subject to reductions (before any adjustments for an optional form of pension payment selected by the Participant under the Basic Plan) as follows:

(Y) If a participant retires prior to age 65, the supplemental pension benefit will be reduced by 3% for each year (.25% per month) b which retirement precedes age 65 and the resulting amount will be further reduced by 6.67% for each year (.5558% per month) of Total Service less than 15 years.

(Z) If a Participant retires at or after age 65, the reduction will be 6.67% for each year (.5558% per month) of Total Service less than 15 years.

(c) The supplemental pension benefit for any Participant will be payable at the same time and in the same manner as the pension payable to such Participant under the Basic Plan. If a Participant has elected an optional form of pension under the Basic Plan, such option shall also be applied to the supplemental pension benefit.

(d) A Participant will continue to accrue Credited Service for purposes of the supplemental pension benefit during any period for which he is receiving a supplemental disability benefit under the Plan.

4. DEFERRED COMPENSATION BENEFIT. A deferred compensation benefit will be paid upon the death of any Participant after retirement on pension (other than a deferred vested pension) under a Basic Plan to the person or persons designated by the Participant provided that, at the time of admission to the Plan, the Participant passes a physical examination designated by the Corporation. The deferred compensation benefit will be an amount equal to twice the Participant's annual base salary rate in effect on the date of the Participant's admission to the Plan, after deduction of any amounts required by law to be withheld from such payment, and will be payable in a single lump sum unless the Participant signs and files with the Corporation an election to have payment made in up to 10 equal annual installments in which event payment will be made (without interest) in accordance with such election.

5. SUPPLEMENTAL DISABILITY BENEFIT. Any Participant entitled to receive basic long term disability benefits under any disability benefit plan maintained by the Corporation or any of its subsidiaries and whose Total Service at the date of disability exceeds five years, will receive during each month of disability a supplemental disability benefit equal to the amount, if any, by which 60% of such Participant's monthly base salary at the date of disability exceeds the total amount of all disability and pension benefits available to him for such month under any plan maintained by the Corporation or any of its subsidiaries and under social security, workers' compensation or any other governmental plan or program.

6. SUPPLEMENTAL MEDICAL BENEFITS. (a) Following termination of active employment on account of disability, a Participant may obtain supplemental medical benefits during any period for which he is receiving a supplemental disability benefit under the Plan, by making contributions therefor at the rate

applicable to active employees. The amount and terms of such supplemental medical benefits will be equivalent to those available generally to active employees and their dependents (after taking into account all medical benefits available to the Participant under Medicare or other government programs).

(b) In the event of death of any Participant, the dependents of that Participant may obtain medical benefits equivalent to those available generally to the dependents of active employees by making contributions therefor at a rate equivalent to that applicable to the dependents of active employees, so long as they are not eligible for similar benefits under a group insurance plan of another employer and, in the case of the Participant's spouse, so long as he or she does not remarry.

(c) Dental benefits will be provided at no cost to (i) Participants (and the dependents of Participants) who retire and receive under a Basic Plan a pension other than a deferred vested pension and (ii) Participants or their dependents who are entitled to medical benefits under subparagraphs (a) or (b) above. Dental benefits provided hereunder will be equivalent to those available generally to active employees and their dependents under the Corporation's dental insurance plan.

7. ADMINISTRATION. The Plan will be administered by a Committee appointed by the Board of Directors, none of whose members will be eligible to participate in the Plan. Such Committee will be the Executive Compensation Committee. Except as otherwise set out herein, the Committee will have full and absolute power and authority to select Participants and terminate their participation and to adopt, amend and repeal such rules, regulations, policies and practices with respect to the Plan as it in its sole discretion may deem appropriate, which may be based to the extent deemed advisable by the Committee on the terms and conditions of the corollary base plan. In the exercise of its duties hereunder, the Committee is not required to treat apparently similar or identical cases consistently, and every determination made pursuant to the provisions of the Plan by the Committee shall be

final, and shall be binding and conclusive for all purposes and upon all persons.

8. FUNDING. The Plan is an unfunded deferred compensation plan of the type described in Sections 201(2), 301(a)(3) and 401(a)(1) of the Employee Retirement Income Security Act of 1974. Benefits under the Plan will be paid as they become due from general assets and no funds will be set aside for that purpose.

9. NO EMPLOYMENT RIGHTS. The Plan is not an employment contract and it does not give any Participant a right to continued employment.

10. SUSPENSION OF BENEFITS. If any Participant or other person entitled to receive benefits under the Plan shall engage in any activity or conduct which, in the judgment of the Committee, is prejudicial t the best interests of the Corporation or its subsidiaries, payment of benefits to such person may be suspending during the period he shall continue to engaged. Regular employment with the Corporation or its subsidiaries shall suspend the right of a Participant to supplemental pension benefit payments during the period of such employment.

11. ASSIGNMENT. Assignment of benefits under the Plan will not be permitted or recognized.

12. AMENDMENT AND TERMINATION. The Board of Directors may amend or terminate the Plan at any time for any reason and thereafter Participants and their estates and dependents shall have only such rights under the Plan, if any, as shall be specifically provided for by the Board of Directors under the Plan as amended or terminated.

13. EFFECTIVE DATE. The Plan is effective as of August 23, 1977.